91-856

No. _____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

JERRY COCHRAN
Petitioner.

v.

AMERICAN ABRASIVE METALS CO.
DEVOE & RAYNOLDS CO.
HOECHST CELANESE CORPORATION
GROW GROUP, INC.
PALMER INTERNATIONAL, INC.
Respondents.

On Petition For Writ of Certiorari
To The United States Court of Appeals
For The Eleventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

WHETHER THE PRODUCT LIABILITY ACTION OF A SAILOR INJURED BY TOXIC DUST WHILE PERFORMING MAINTENANCE ABOARD A SHIP AT DOCK AND ON THE OPEN SEA IN THE FURTHERANCE OF THE MISSION OF THE SHIP IS WITHIN FEDERAL ADMIRALTY AND GENERAL MARITIME JURISDICTION.

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CONSTITUTION, STATUTES AND REGULATIONS

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OPINIONS BELOW

This Petition is a Writ of Certiorari for review of the following decision: *Cochran v. E.I. duPont de Nemours*, No. 90-8113, (11th Cir., 6/19/91). The decision is reproduced in its entirety in the Appendix to this Petition. The Orders of the Honorable Orinda Evans, Judge, U.S. District Court, Northern District of Georgia entered on November 2, 1989 and January 4, 1990 concerning the issue on appeal are also reproduced in their entirety in the Appedix to this Petition.

Appellants filed a Suggestion for Rehearing In Banc on July 10, 1991. Under the Rules of the Eleventh Circuit, a suggestion for rehearing in banc is also treated as a petition for rehearing before the original panel. 11th Cir. R. 35-6. The denial of the petition was filed on August 29, 1991.

STATEMENT OF JURISDICTION

Appellant Jerry Cochran seeks the review of an opinion of the United States Court of Appeals for the Eleventh Circuit which was entered on June 13, 1991. This Court's jurisdiction is invoked pursuant to 28 USC §1254(1). This petition is timely filed pursuant to Rule 12 of the Rules of this Court.

CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS INVOLVED

U.S. CONST. art. 3, §2:

The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority; to all Cases of admiralty and maritime Jurisdiction;

28 USC §1333(1):

The district courts shall have original jurisdiction, exclusive of the courts of the States, of:

(1) Any civil case of admiralty or maritime jurisdiction, saving to suitors in all cases all other remedies to which they are otherwise entitled.

STATEMENT OF THE CASE

Plaintiff Jerry Cochran was in the U.S. Navy from 1972 through 1975. He served aboard the aircraft carrier, the *U.S.S. INDEPENDENCE*, from 1972 through 1974. He was exposed to hazardous dust containing silica and asbestos aboard the ship while performing his duties as a sailor.

Jerry Cochran was assigned to the hangar deck grinding crew aboard the U.S. aircraft carrier, the *U.S.S. INDEPENDENCE*, from 1972 through 1974. Cochran Depo. of 3/1/88 [Cochran I] at 29, 30. The grinding crew had the duty of maintaining the vessel's hangar deck non-skid coating. *Id.* at 33, 36 and 38. The hangar deck was located one deck below the flight deck for the storage of aircraft during voyages. *Id.* at 31, 73. The entire hangar deck was covered with non-skid coating. *Id.* at 83.

Jerry Cochran lived aboard the *U.S.S. INDEPENDENCE*. R. 6-177 - Exhibit E [Cochran affidavit] [reproduced in appendix]. He had many duties aboard the ship including watches aboard ship, pier watch, chock and chain duties on the hangar deck, the moving of planes, radio operation and deck maintenance on the grinding crew. *Id.* He also guarded planes and kept the hangar deck swept. Cochran Depo. I at 33. In drills and actual confrontation with hostile forces, he reported to general quarters. R. 6-177-Exhibit E.

During 1972 and 1973, the hangar deck of the *U.S.S. INDEPENDENCE* was overhauled in the U.S. Navy shipyard in Norfolk, Virginia. Dickerson Depo. at 47. During the overhaul, Cochran was on the grinding crew and re-

moved the non-skid from the entire hangar deck and re-applied it. Cochran Depo. I at 62. During the overhaul, he lived aboard the ship and had duties other than maintenance in performing his job as a sailor. The non-skid grinding and replacement was also performed while the ship was on the open sea. *Id.* at 49-50; Williams Depo. at 23-26. The removal and re-application of the non-skid was performed as regular maintenance of the ship. Dickerson Depo. at 62-63, 129-130.

Jerry Cochran performed the maintenance on the non-skid on two major voyages aboard the ship as well as during sea trials. Cochran Depo. of 1/5/89 [Cochran Depo. II] at 58-62. The voyages on which this maintenance was performed sailed from Norfolk to ports in the Mediterranean Ocean, including the countries of Greece, Turkey, Spain and Italy. *Id.* at 60. Athens, Greece was the ship's home Mediterranean port and non-skid hangar deck maintenance work was performed there. Williams Depo. at 20-21.

American Abrasives made their non-skid coating EPOXO 1000-B specifically to conform to military specification MIL-D-23003, Type II. Sayre Depo. at 46, 47, 62-63, 124 [reproduced in appendix]. The military performance specification was for ship deck covering and the finished product was often shipped straight to the Norfolk Navy shipyard. *Id.* at 38, 101 [reproduced in appendix]. American Abrasive advertised their product in a pamphlet with an aircraft carrier pictured on it using the product. R. 7-176-8 [reproduced in appendix].

American Abrasives was aware that the Navy would grind off the non-skid coating before re-applying a fresh

coat. *Id.* at 120, 132-134. The sales department of American Abrasives submitted bids for the product to the Navy when the Navy requested quotations of price for the product. *Id.* at 113-114.

The U.S. Navy published a qualified product list (QPL) for supply of non-skid coating that passed the performance test MIL-D-23003. Sayre Depo. at 57; R. 5-154 — Exhibit 31-35. The U.S. Navy could only purchase non-skid coating from suppliers on the QPL. *Id.* at 115. Defendants Devoe and Palmer were American Abrasive's only competition for sale of non-skid coating to the U.S. Navy. Sayre Depo. at 36, 58, 108 [reproduced in appendix]. DEVRAN 237 was the product made by Devoe which was approved and listed on the QPL. Sayre Depo. at 64-65 [reproduced in appendix]. PM501 M-1 EPOXIT was the product made by Palmer which was approved and listed on the QPL. Sayre Depo. at 140 [reproduced in appendix].

Devoe's product, DEVRAN 237M, was also developed specifically for marketing by Devoe Marine Coatings to the U.S. Navy for use aboard its ships. Flegenheimer Depo. at 76 [reproduced in appendix]; R. 5-154, Exhibits 36, 37 and 38. Palmer also formulated its non-skid product, PM501 M-1 EPOXIT to conform to the military performance specification MIL-D-23003. Palmer Depo. at 49. The Palmer product was marketed specifically as a deck covering and was often shipped straight to the Norfolk Navy shipyard and other U.S. Naval facilities. R. 5-154-Exhibit 40; Palmer Depo. at 42-45 [reproduced in appendix]. Palmer officials often visited U.S. Naval facilities to which the product was shipped and saw the product in use. Palmer Depo. at 45-49 [reproduced in appendix].

Jerry Cochran would grind the non-skid off of the hangar deck when it was showing signs of wear. Cochran I at 36. This grinding was done with a tennant machine as recommended by the manufacturers of the non-skid. *Id.* at 38; Dickerson Depo. at 47, 110, 112. The grinding activity created dust that Jerry Cochran worked in while operating the tennant machine. *Id.* After grinding the non-skid, Jerry Cochran would sweep it up and shovel it into a barrel. Cochran Depo. I at 38, 39. All these activities created dust. In 1974, during his second Mediterranean voyage aboard the ship *U.S.S. INDEPENDENCE* Mr. Cochran was air-lifted and hospitalized for lung complaints. Cochran I at 85, 87-89; Cochran Depo. II at 61, 82, 86. He was diagnosed with sarcodosis. *Id.* at 82. Sarcodosis is a lung disease of unknown origin. Watters Depo. of 5/12/89 (Watters I at 37.)

Mr. Cochran was seen by Dr. Watters at the Veteran's Administration for the first time in February of 1987. Watters I at 33-34. Dr. Watters was concerned with the presence of silica particles which he felt signified a significant silica exposure. *Id.* at 56. He eventually diagnosed an occupational lung disease called silicatosis, a mixed dust disease. Watters Depo. of 5/22/89 [Waters II] at 84, 85. Silicatosis can mimic sarcodosis in appearance. *Id.* at 79, 85. Dr. Watters was the first doctor to ever tell Mr. Cochran that he may have an occupationally-related lung disease.

EXISTENCE OF JURISDICTION

The Eleventh Circuit Court of Appeals had jurisdiction over this matter pursuant to 28 USC §§1332(a)(1), 1333(1).

SUMMARY OF ARGUMENT

Reasons For Granting The Writ

The U.S. Court of Appeals for the Eleventh Circuit has rendered an opinion in conflict with the Supreme Court of the United States. *Cochran v. E.I. duPont de Nemours*, Nos. 90-8113, 90-8535, slip op. (11th Cir. June 19, 1991); *see McDermott International v. Wilander*, 498 U.S. __, 112 L.Ed.2d 866, 111 S.Ct. 807 (1991); *Sisson v. Ruby*, 497 U.S. __, 111 L.Ed.2d 292, 110 S.Ct. 2892 (1990). Furthermore, the Eleventh Circuit decision in *Cochran* is in conflict with a decision from the Ninth Circuit. *Martinez v. Pacific Indus. Service Corporation*, 904 F.2d 521 (9th Cir., 1990).

In *Wilander*, the Supreme Court found that federal admiralty and general maritime jurisdiction applied to an inspector who was permanently attached to a vessel which was performing maintenance work on oil rigs. In *Sisson*, the Supreme Court found federal admiralty and general maritime jurisdiction in an incident involving a marina fire aboard docked pleasure yachts. This opinion is directly contrary to the Eleventh Circuit opinion in *Lewis Charters v. Huckins Yacht Corporation*, 871 F.2d 1046 (11th Cir., 1989), which the Eleventh Circuit relied on in the *Cochran* decision finding there was no federal admiralty or general maritime jurisdiction.

Furthermore, the Ninth Circuit in *Martinez* found federal admiralty and general maritime jurisdiction in an action involving a maintenance man, rather than a sailor, who was performing maintenance on docked U.S. Naval vessels. This decision and rationale is directly contrary to that which the Eleventh Circuit applied in finding that

federal admiralty and general maritime jurisdiction did not apply in the action of Mr. Cochran who was injured performing maintenance work aboard a vessel both at dock and on the open seas.

Mr. Cochran was a sailor. One of his duties aboard the ship to which he was assigned was the performance of maintenance aboard the ship. This maintenance furthered the mission of the ship. The maintenance was performed at dock and on the high seas. Mr. Cochran's action has a closer connection to admiralty and general maritime concerns than prior cases where federal jurisdction has been found. *See McDermott International v. Wilander, supra,* 498 U.S. __, 111 S.Ct. 807; *Sisson v. Ruby, supra.* 497 U.S. __, 110 S.Ct. 2892.

DISCUSSION

A. The Protection Of Seamen Injured While Performing The Work Of The Vessel To Which They Are Permanently Attached Is A Traditional Role Of Federal Maritime Law.

1. *Cochran Met The Locality Test.*

Federal jurisdiction over admiralty and general maritime matters is constitutionally required. U.S. CONST. art. 3, §2; 28 USC §1333(1). To establish federal jurisdiction, a party must satisfy two tests: (1) the locality test, and (2) the nexus test. *Sisson v. Ruby,* 497 U.S. __ ,111 L.Ed.2d 292, 110 S.Ct. 2892 (1990); *Executive Jet Aviation, Inc. v. City of Cleveland,* 409 US 249, 261, 93 S.Ct. 493, 501, 34 LEd 2d 454 (1972). The locality test simply requires that the incident giving rise to the action occur in navigable waters. The nexus test requires that the incident have a significant relationship with traditional maritime activity. *Sisson v. Ruby, supra.* 111 L.Ed. 2d at 298-99; *Executive Jet, supra.* 409 U.S. at 268. The Fifth and Eleventh Circuits enunciated four significant factors for consideration in determining whether the nexus requirement was met. *Harville v. Johns-Manville Products Co.,* 731 F.2d 775, 781 (11th Cir., 1984); *Kelly v. Smith,* 485 F.2d 520, 524 (5th Cir., 1973). These four factors were:

(1) the function and role of the parties;

(2) the types of vehicles and instrumentalities involved;

(3) causation and type of injury; and

(4) traditional concepts of the role of admiralty law. *Id.*

The original opinion in this appeal held that Mr. Cochran clearly satisfied the locality test because the injurious exposure occurred on navigable waters at the naval base in Norfolk, Virginia and upon the open seas. *Cochran v. E.I. duPont de Nemours*, Nos. 90-8113, 90-8535 slip op. at 3803 (11th Cir. June 19, 1991). The original opinion also held that Cochran's work aboard the vessel was traditionally done by seamen and was a factor in favor of satisfaction of the nexus requirement. *Id.* Nevertheless, the opinion held that Mr. Cochran failed to satisfy the nexus test primarily because the injury was of a type which could also occur on land and because the action did not have a discernible relationship with traditional maritime activities involving navigation or commerce on navigable waters. *Id.* at 3804. This holding conflicts with controlling Supreme Court precedent.

2. *Federal Maritime Jurisdiction Attaches To Incidents Arising From Maintenance Of A Vessel.*

The *Cochran* opinion relied heavily on *Lewis Charters v. Huckins Yacht Corp.*, 871 F.2d 1046 (11th Cir., 1989), an opinion which has little precedential value after the U.S. Supreme Court's opinions in *Sisson* and *Wilander*. *Sisson v. Ruby, supra.* 111 L.Ed.2d 292, 110 S.Ct. 2892; *McDermott International v. Wilander*, 498 U.S., 112 L.Ed.2d 866, 111 S.Ct. 807 (1991). The *Sisson* facts were nearly identical to those in *Lewis Charter*. Both involved a marina fire which started aboard docked pleasure yachts. Both actions were limitation of liability actions in which the yacht owners attempted to limit their liability to the value of their yachts pursuant to the Limitation of Vessel Owners Liability Act. 46 USC §181 et seq. Both the Eleventh Circuit

in *Lewis Charter* and the Seventh Circuit in *Sisson* held that no federal maritime jurisdiction attached because the incident was not within the traditional concerns of maritime law (i.e., failed the nexus test). *Lewis Charter, supra.* 871 F.2d at 1052; *Complaint of Sisson,* 867 F.2d 341, 347-48 (7th Cir., 1989).

The Supreme Court reversed the Seventh Circuit stating, "We, therefore, conclude that just as navigation, storing and maintaining a vessel at a marina on a navigable waterway is substantially related to a traditional maritime activity". *Sisson v. Ruby, supra,* 111 L.Ed.2d at 302. The Supreme Court referred to the four-factor test adopted by the Fifth Circuit in *Kelly* and the Eleventh Circuit in *Lewis Charters. Sisson v. Ruby, supra,* 111 L.Ed.2d at 301 n. 4. Although, the parties and amici requested the Court to adopt a test, whether it be the *Kelly* four-factor test or another circuit's test, the Court specifically refused to do so. *Sisson v. Ruby, supra,* 111 L.Ed.2d at 301 n. 4. The Court stated, "[T]he formula initially suggested by *Executive Jet* [409 U.S. 249, 253-55, 266-68] and more fully refined in *Foremost* [457 U.S. 668, 670-73] and in this case provides appropriate and sufficient guidance to the federal courts. We, therefore, decline the invitation to use this case to refine further the test we have developed." *Id.*

The concurring opinion of Justice Scalia proposed a further streamlining of the jurisdictional question. He wrote that the "significant relationship" test threatened to sow confusion into the question of whether a vessel-related tort was within federal maritime jurisdiction. *Sisson v. Ruby, supra,* 111 L.Ed. 2d at 303. "[I]t is folly to apply it [the significant relationship test] to the generality of cases involving vessels". *Id.* at 305. He further stated, "The

sensible rule to be drawn from our cases, including *Executive Jet* and *Foremost*, is that a tort occurring on a vessel conducting normal maritime activities in navigable waters — that is, as a practical matter, every tort occurring on a vessel in navigable waters — falls, within the admiralty jurisdiction of the federal courts." *Id.* at 306.

Mr. Cochran's action involves a vessel-related tort. He was exposed to the hazardous dusts aboard a ship while performing his duties as a seaman on navigable waters. If *Sisson* (involving a fire caused by a washer/dryer), meets the significant relationship test, then certainly Cochran's action meets the test since both vessels were at dock for vessel maintenance purposes. *Id.* at 302. It is the general conduct from which the incident arises, rather than the particular circumstances of the incident, which is the relevant activity for purposes of determining jurisdiction. *Id.* at 301. In both *Sisson* and *Cochran*, the general conduct which is relevant to determine jurisdiction is vessel maintenance.

The *Cochran* opinion acknowledged that Mr. Cochran's exposure occurred in navigable waters while at dock and at sea. *Cochran, supra*, slip op. at 3804. The only further analysis necessary under *Sisson* is whether Plaintiff was involved in the general conduct of maintaining the vessel. If so, then federal maritime jurisdiction attaches. The *Cochran* opinion notes that Mr. Cochran was "maintaining the ship's deck which allowed storage of aircraft during voyages". *Cochran, supra*, slip op. at 3803. Therefore, the inquiry should have ended with a finding of federal maritime jurisdiction and an application of the federal discovery rule, and a remand for trial. It was error for the panel to require Mr. Cochran to have a specific

connection with navigation. *Cochran, supra,* slip op. at 3804. It was error to apply Virginia law simply because the ship had been docked there.

The Supreme Court has recently emphasized the irrelevance of the location of the actions if they are vessel related. In an opinion concerning whether an agency contract was within federal admiralty jurisdiction, it adopted the following rule: "[T]here is no difference in character as to repairs made upon . . . a vessel . . . whether they are made while she is afloat, while in dry dock, or while hauled up [on] land. The nature of the service is identical in the several cases, and the admiralty jurisdiction extends to all". *Exxon Corp. v. Central Gulf Lines, Inc.,* No. 90-34, slip op. at 9 (U.S. June 3, 1991).

3. *Federal Maritime Law Does Not Require That An Injured Seaman Be Engaged In Navigation.*

One of the primary traditional purposes of federal maritime law is to provide a remedy for injured seamen. *McDermott International v. Wilander,* 498 U.S. __, 112 L.Ed. 2d 866, 111 S.Ct. 807 (1991); *Kelly v. Smith,* 485 F.2d 520, 526 (5th Cir., 1973). In 1920, Congress passed the Jones Act specifically to provide seamen a negligence action for personal injury. *Id.* at 112 L.Ed. 2d at 874; 46 USC §688. The Supreme Court has rendered numerous decisions on the rights of seamen to recover for personal injury. *E.g., Wilander, supra,* 112 L.Ed.2d at 874. Numerous treatises have been written on the law governing a seaman's remedies. S. Friedell, 1B *Benedict on Admiralty,* (7th ed., 1989); M. Norris, *The Law of Seamen,* (4th ed., 1985); M. Norris, *The Law of Maritime Personal Injury,* (3rd ed., 1975).

The Supreme Court has held that a seaman is entitled to a negligence action even if he is not engaged in navigation. *Wilander, supra,* 112 L.Ed.2d at 882. The Court flatly stated that,"[T]he time has come to jettison the aid in navigation language". *Id.* at 881. The *Cochran* opinion erroneously held that Mr. Cochran's acts of vessel maintenance failed to meet the nexus test because his work was not associated with navigation. *Cochran, supra,* slip op. at 3804. Although *Wilander* concerns a seaman's remedy under the Jones Act rather than federal maritime products liability law, it is precedential and at odds with the *Cochran* rationale. Mr. Wilander was a paint foreman whose duties involved sandblasting and painting platforms in the Persian Gulf. *Wilander, supra,* 112 L.Ed.2d at 872. While he was inspecting one platform pipe, a plug blew out of it and injured his head. Three facts deserve our attention.

First, Mr. Wilander was not a sailor and he had no duties aboard the vessel, the *M/V Gates Tide,* to which he was assigned. The vessel only transported him between platforms. He was performing work just as if he were a land based worker inspecting pipes. The only differences between Mr. Wilander and a land based inspector were that Mr. Wilander had a permanent connection with the *M/V Gates Tide* and he helped the vessel perform its primary purpose, that of inspecting and maintaining platforms. Similarly, Mr. Cochran was permanently assigned to the *U.S.S. INDEPENDENCE* and performed maintenance aboard the vessel which was necessary to further the mission of the vessel.

Second, Mr. Wilander suffered a head injury. Thousands of land based workers may also suffer head injuries.

Some of these head injuries may be caused by errant pipe plugs. Third, Mr. Wilander was injured by a pipe plug. Pipe plugs are probably also used on land. In *Wilander*, the Supreme Court focused on the first fact above and was not concerned with the last two. The *Cochran* opinion errs by placing emphasis on the last two factors by finding that land based workers may also be injured by non-skid dust and denying jurisdiction. *Cochran, supra.* at 3804.

There is absolutely no reason to expect that the Supreme Court's unanimous decision in *Wilander* finding federal maritime jurisdiction would have been any different if Wilander had filed a product liability action. *East River Steamship Corp. v. Transamerica DeLaval*, 476 U.S. 858, 864-65 (1986) [defective turbines]; *Sperry Rand Corp. v. RCA*, 618 F.2d 319, 321-22 (5th Cir., 1980). Remedies for seamen and products liability are both traditional maritime concerns. *Id.; see generally* 7 ALR Fed. 502; 1 ALR 4th 411.

Mr. Cochran has as much a relationship with traditional maritime concerns as Mr. Wilander. Both men had a permanent connection with a vessel. However, unlike Mr. Cochran, Mr. Wilander was not even injured on a vessel but on a stationary platform. Both men were involved in maintenance. However, unlike Mr. Cochran, Mr. Wilander was not maintaining a vessel. Both men were injured in foreign waters. Although it is unclear whether Mr. Wilander was injured in the territorial waters of a Persian Gulf nation, it is clear that Mr. Cochran was injuriously exposed in the international waters of the North Atlantic and Mediterranean Oceans. These facts demonstrate that Mr. Cochran, an actual sailor, had a greater nexus with maritime activities than Mr. Wilander.

4. *Product Liability Law Within Federal Admiralty Jurisdiction Requires Uniformity Under Federal Law.*

The *Cochran* opinion focused on Mr. Cochran's asbestos exposure rather than his silica exposure in denying federal maritime jurisdiction for lack of a sufficient nexus. *Cochran, supra,* slip op. at 3804. However, federal trial courts have recognized that seamen exposed to asbestos aboard vessels are just as entitled to remedies under federal maritime law as other seamen. *Robinson v. U.S.*, 730 F.Supp. 551 (S.D. N.Y. 1990); *Tritt v. Atlantic Richfield Co.*, 709 F.Supp. 630 (E.D. Pa. 1989). In *Tritt*, the trial court relied extensively on the Fifth Circuit opinion of *Kelly v. Smith*, which had been adopted by the Third Circuit, in analyzing the four nexus factors. The trial Court cogently stated:

> Allowing asbestos manufacturers and distributors to avoid the federal courts' admiralty jurisdiction simply because their products have a variety of uses, many of which are non-maritime, unduly prejudices those seamen whom admiralty law was designed to protect and undercuts the advantages derived from uniformity of law governing products liability in admiralty. *Id.* at 633.

In *Robinson*, a merchant marine also brought a products liability claim against asbestos manufacturers. The trial court noted that the Second Circuit had rejected the Fifth Circuit *Sperry Rand* decision in 1983. *Robinson v. U.S., supra,* 730 F.Supp. at 554. However, the Supreme Court had decided *East River Steamship Corp.* in 1986 and had, in effect, adopted *Sperry Rand*. The trial court stated:

> I agree with plaintiff at bar that *Executive Jet* "nexus" or "status" analysis is appropriate only in that borderline case. . . The case at bar involves a tort occurring on the high seas, governed by theories of liability explicitly made a part of the general maritime law in *East River*. I conclude that *East River* precludes an asbestos manufacturer from arguing that because asbestos used on shipboard was not specifically designed for maritime use, a seaman injured by the asbestos on the high seas cannot involve admiralty jurisdiction. After *East River*, the seamen can do so.

B. The *Cochran* Decision Conflicts With The *Martinez* Decision Of The Ninth Circuit.

The fact that Mr. Cochran was frequently exposed to the toxic dusts while the ship was docked in Virginia does not foreclose his product liability action. The Ninth Circuit has recently found that an employee of a contractor employed to clean a U.S. naval vessel in the port of San Diego, California is entitled to bring his action under federal admiralty and general maritime law. *Martinez v. Pacific Indus. Service Corp.*, 904 F.2d 521 (9th Cir., 1990). Martinez was a land based employee whose knee was injured by pressurized water. The plaintiff's work was described as that which "had to be done as part of the rhythm of maintaining the ship as a functioning vehicle. Admiralty law is concerned with what keeps a ship in good working order". *Id.* at 524. In agreeing with Fifth Circuit precedent in *Martinez v. Dixie Carriers*, 529 F.2d 457, 469 (5th Cir., 1976), the Ninth Circuit stated:

> To sum up, Martinez was injured on navigable waters performing work traditionally performed

> by seamen. He had performed such work for four years in the course of attachment to the United States Navy, using equipment with an operations manual designed for use by the Navy. His work bore directly on the function of the vessel and had an intricate connection with maritime commerce. Admiralty jurisdiction exists.

Martinez v. U.S., supra. 904 F.2d at 525.

C. All Material Questions Of Fact Concerning Jurisdiction Must Be Construed In Favor Of Plaintiff.

1. *The Burden Of Proof Is On The Defendants.*

The burden of proof is on the movant in summary judgment proceedings. Rule 56(c), F.R.C.P. The non-movant is *not* required to prove all essential elements of his case at this stage of the action. *Id.* However, if after adequate time for discovery, movant makes a showing that demonstrates the absence of a genuine issue of material fact concerning an essential element of the action, then the nonmovant must affirmatively respond. *Celotex v. Catrett* 477 U.S. 317, 323 91 L.Ed.2d 265, 274, 106 S.Ct. 2548 (1986); [issue of product exposure; 6-3 decision]. To avoid summary judgment, the nonmovant only has to submit evidence for the Court's consideration which establishes a genuine issue of material fact. *Id.* 91 LEd.2d at 274-75.

Summary judgment is only proper if there are no genuine issues of material fact. *Anderson v. Liberty Lobby,* 477 U.S. 242, 248 (1986). Material facts are those which may affect the outcome of a lawsuit. *Id.* at 248. All evidence must be viewed and all possible inferences must be made

in favor of the nonmovant. *Adickes v. Kress & Co.*, 398 U.S. 144, 157 (1970). The Court must cull the universe for reasonable inferences in the nonmovant's favor. *Carlin Communications v. So. Bell*, 802 F.2d 1352, 1356 (11th Cir., 1986). Summary judgment must be denied even if the nonmovant's conclusions from the evidence are not the more likely or probable ones. *Id.*

The issues herein involved are constitutional issues of federal jurisdiction. U.S. Const. Art. 3, §2; 28 USC §1333; *Pope v. Talbot*, 346 U.S. 470, 409-11 (1953). Plenary review of the trial court order denying federal maritime jurisdiction is required. *De Cuellar v. Brady*, 881 F.2d 1561, 1565 (11th Cir., 1989); *Underwood v. Hunter*, 230 F.2d 614 (11th Cir., 1984).

2. *All The Defendant's Products Were Made And Sold For Maritime Purposes.*

The *Cochran* opinion contains several findings of fact on disputed material facts. First of all, the Court notes that at least one of the defendant companies, American Abrasives, made its products specifically for naval use aboard aircraft carriers. *Cochran, supra*, slip op. at 3803. Plaintiff contends that the other two products were also made specifically for naval use. *See* Statement of Case and appendixes.

Representatives of the other companies have given testimony to support this contention. Flegenheimer Depo. at 76; Palmer Depo. at 42-45 [reproduced in appendix]. American Abrasives' representative testified that the other two defendants were its only competitors in sales of the nonskid coating to the U.S. Navy. Sayre Depo. at 36, 58, 108 [reproduced in appendix]. Therefore, the panel's finding of

fact that the use of the products aboard a navigable vessel was tangential is inconsistent with its prior finding that the product of American Abrasives was specifically for naval use aboard aircraft carriers. *Cochran, supra,* slip op. at 3803-04. This is a material finding of fact and Plaintiff is entitled to an inference in favor of jurisdiction. *Anderson, supra,* 477 U.S. at 248.

3. *A Jury Question Exists Concerning Which Exposures Were The Proximate Cause Of Mr. Cochran's Injury.*

The *Cochran* opinion also found as a material fact that most of Mr. Cochran's toxic exposure occurred while the vessel was not in navigation [emphasis added]. *Cochran, supra.* slip op. at 3804 n. 4. The place of exposure, whether at dock or on the open seas, is irrelevant. *Exxon Corp., supra.* slip op. at 9. Furthermore, none of the parties attempted to quantify how much exposure occurred at sea as opposed to at the dock or which exposures caused Mr. Cochran's injury. We do know that Mr. Cochran was not airlifted off the *U.S.S. INDEPENDENCE* and put into a hospital for his lung ailment until after he had crossed the Mediterranean Ocean for a second time during which times he was injuriously exposed to the hazardous dusts. The proximate cause of Mr. Cochran's lung injuries is a jury question. *Cain v. Vontz,* 703 F.2d 1279, 1282-1283 (11th Cir., 1983).

4. *The Record Does Not Support A Finding That Thousands Of Land-Based Workers Have The Same Injury As Mr. Cochran.*

Also, the *Cochran* opinion makes the finding of fact, unsupported in the record, that thousands of land-based

workers have the same injury as Mr. Cochran. *Cochran, supra,* slip op. at 3804. Mr. Cochran has been diagnosed with silicatosis by his treating physician. Watters II at 84-85. Silicatosis is a lung disease caused by exposure to silica and other minerals which may include asbestos. Mr. Cochran's silicatosis was allegedly caused by his exposure to dust containing primarily silica but also asbestos and perhaps other lung scarring dusts. Maybe thousands of land-based workers have silicatosis; maybe they do not. The record does not support a finding either way because it was never an issue. However, the inquiry concerning the mechanism of injury tells us nothing.

5. *The Mechanism And Type Of Injury Are Irrelevant To Establishing Federal Maritime Jurisdiction.*

Seamen are injured aboard vessels in numerous ways. Some break their arms, some injure vertebral discs, some receive head injuries and some receive lung injuries. Other than drowning, there do not appear at first glance to be any injuries which can be said to be uniquely maritime. However, the law does not place such a restrictive requirement on federal maritime jurisdiction. It is the work of the seaman that is important. *Wilander, supra,* 112 L.Ed.2d at 881-82.

It is doubtful that any land based worker has been injured by hazardous dusts while maintaining the hangar decks of an aircraft carrier. All such work is done by sailors who are permanently attached to the vessel. Therefore, the opinion's reliance on *Harville* on this point is misplaced. *Cochran, supra,* slip op. at 3804 citing *Harville v. Johns-Manville,* 731 F.2d 775 (11th Cir., 1984). The *Harville*

plaintiffs were land based workers doing the same job on the vessels as they did on land. Mr. Cochran was not a land based worker; he did not work on land repairing non-skid coating made and sold for use on aircraft carriers. He only worked on the aircraft carrier where he also lived as a sailor.

CONCLUSION

The Supreme Court must jealously guard federal jurisdiction over general maritime and admiralty actions. Otherwise, the law in the area will degenerate into a hodge podge of law depending on the location of the ship's home port. Under the rationale in *Cochran*, California law would have applied if the *U.S.S. INDEPENDENCE* had been docked in San Diego.

This development would thwart the Constitutional mandate which reserved federal jurisdiction to admiralty and general maritime matters. Without federal jurisdiction in this area, no uniformity can ever be attained. The *Cochran* decision must be reversed and the case remanded for trial.

Respectfully submitted,

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APPENDIX

INDEX TO APPENDIX

APPENDIX A

THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 90-8113 and 90-8535

JERRY COCHRAN, GERALDINE COCHRAN,
Plaintiff-Appellants,

verus

E. I. DUPONT DENEMOURS, REN PLASTICS, INC., CIBA GEIGY CORPORATION,
Defendants,

AMERICAN ABRASIVE METALS, CO., DEVOE & REYNOLDS CO., HOESCHT CELANESE CORPORATION, GROW GROUP, INC., PALMER INTERNATIONAL, INC.,
Defendant-Appellees.

On Appeal from the United States District Court for the Northern District of Georgia

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ON PETITION(S) FOR REHEARING AND SUGGESTION(S) OF REHEARING EN BANC

(Opinion June 19, 11th Cir., 1991, ____F.2d____).

Before: HATCHETT and ANDERSON, Circuit Judges, and LIVELY*, Senior Circuit Judge.

PER CURIAM:

(X) The Petition(s) for Rehearing are DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be

polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing En Banc are DENIED.

( ) The Petition(s) for Rehearing are DENIED and the Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing En Banc are also DENIED.

( ) A member of the Court in active service having requested a poll on the reconsideration of this cause en banc, and a majority of the judges in active service not having voted in favor of it, Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

/s/_____
Joseph W. Hatchett
United States Circuit Judge

* Honorable Pierce Lively, Senior U.S. Circuit Judge for the Sixth Circuit, sitting by designation.

APPENDIX B

Jerry COCHRAN, Plaintiff-Appellant,

Geraldine Cochran, Plaintiff,

v.

E.I. duPONT de NEMOURS, Ren Plastics, Inc., Ciba-Geigy Corporation, Defendants,

American Abrasive Metals Co., Devoe & Raynolds Co., Hoechst Celanese Corporation, Grow Group, Inc., Palmer International, Inc., Defendants-Appellees

Jerry COCHRAN, Geraldine Cochran, Plaintiffs-Appellants,

v.

E.I. duPONT de NEMOURS, Ren Plastics, Inc., Ciba-Geigy Corporation, Defendants,

American Abrasive Metals Co., Devoe & Raynolds Co., Hoechst Celanese Corporation, Grow Group, Inc., Palmer International, Inc., Defendants-Appellees

Nos. 90-8113, 90-8535

United States Court of Appeals
Eleventh Circuit.

June 19, 1991

Appeals from the United States District Court for the Northern District of Georgia.

Before HATCHETT and ANDERSON, Circuit Judges, and LIVELY*, Senior Circuit Judge.

HATCHETT, Circuit Judge:

In this case, we examine whether federal maritime jurisdiction extends to personal injury and products liability claims brought by an ex-Navy sailor who was allegedly exposed to silica and asbestos on an aircraft carrier. Because exercise of federal maritime jurisdiction would not advance the policies behind a uniform federal law of admiralty and the state statute of limitations has run, we affirm the district court.

FACTS

In 1972, Jerry Cochran entered the Navy. During his tour of duty, the Navy assigned him to the deck grinding crew of the USS Independence, an aircraft carrier based in Norfolk, Virginia. On the carrier, his duties included maintaining the nonskid floor coating on the hangar deck where aircraft were stored during voyages. In maintaining the deck, Cochran would patch worn areas of the covering, grind it down, sweep it up, and occasionally reapply the nonskid coating. When the ship was in port in Norfolk, Cochran performed these duties three to five times per week. At sea, Cochran maintained the deck two days per week.

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* Honorable Pierce Lively, Senior U.S. Circuit Judge for the Sixth Circuit, sitting by designation.

After working on the grinding crew for about six months, Cochran began to experience dizziness, chest pain, dyspnea, and hemoptysis. He attributed the cause of his respiratory problems to the dust generated during his grinding duties on the nonskid deck; thus, he requested and received a transfer to the laundry room.

In July, 1974, following treatment for non-specific chest and gastrointestinal pains, doctors diagnosed Cochran as having sarcoidosis, a lung disease with an unknown origin. He received an honorable discharge from the Navy in 1975, and after moving back to his home town in Albany, Georgia, spent several months in the Veterans Hospital for psychiatric treatment related to anxiety from his lung condition. Cochran has not worked since his discharge from the Navy, and he smoked approximately one and a half packs of cigarettes per day from 1969 to 1979.

As early as 1978, Cochran began attributing his lung problems to his military duties. In 1982, he told doctors that he felt his exposure to trichlorethylene from his grinding duties or benzene used in the ship's laundry may have caused his lung problems. Additionally, in 1982, Cochran consulted a toxicologist who found several solvents present in his system. Following these examinations, Cochran was once again diagnosed with possible sarcoidosis.

In 1984, a tissue analysis of the Arms Services Institute of Pathology revealed that Cochran had silica particles in his lymph nodes. The Department of Navy stated, however, that the silica particles in his lymph nodes could not be related to an occupational exposure in

the Navy because the nonskid paint used in maintaining the aircraft carrier's deck contained silicone carbide. This report also reviewed Cochran's chest films from 1974 to 1982 and found no abnormalities related to silica. Cochran underwent several other examinations between 1985 and 1987 which revealed that his lung condition had not progressed since 1975. In August, 1987, a Veterans Administration physician recommended that Cochran be reevaluated for service-related disorder disability because his lung problem was likely silicosis rather than sarcoidosis. A physician examined Cochran for asbestosis, but concluded that Cochran's heart was not enlarged, a symptom of that disease. Following the reevaluation, the Veterans Administration diagnosed Cochran as suffering from possible silicosis.

PROCEDURAL HISTORY

In June, 1987, Cochran filed his lawsuit in the United States District Court, Northern District of Georgia, under diversity jurisdiction, alleging personal injury and products liability. The lawsuit was against the following companies and their products: American Abrasive Metal Company, manufacturer of Epoxo 1,000B; Palmer International, Inc., manufacturer of PM-501-M1; Devoe and Raynolds Company, Inc., manufacturer of Devran 237-M; Hoechst Celanese Corp., manufacturer of Devron 237-M; and Grow Group, Inc., manufacturer of Devran 237-M.[1] Cochran alleged that the nonskid coatings manufactured

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[1] Cochran also named E.I. duPont de Nemours, Ren Plastics, Inc., and Ciba-Geigy Corporation as defendants. In May, 1988, the district court granted Cochran's motion to dismiss duPont. Additionally, in April, 1989, the district court dismissed Ren Plastics, Inc. and Ciba-Geigy Corporation.

by these companies conformed to Navy specifications during 1970 to 1974, the period of his alleged exposure. Additionally, Cochran alleged that all of these products contained silica, and the products manufactured by American Abrasive and Palmer International also contained asbestos.

In March, 1989, Cochran filed another lawsuit in the United States District Court, Eastern District of Virginia, alleging admiralty jurisdiction. By agreement, the parties transferred the Virginia case to Georgia. Thereafter, the Virginia case was dismissed. The Georgia district court allowed Cochran to amend his original complaint in this case adding the admiralty claims.

Following discovery, the companies filed a motion for summary judgment. On November 2, 1989, the district court granted the companies' motions for summary judgment finding: (1) maritime jurisdiction did not encompass Cochran's claims for personal injury and products liability; and (2) the Virginia statute of limitations barred Cochran's lawsuit. In December, 1989, the district court granted the companies' motion to tax a total of $22,118.07 in costs against Cochran. Cochran appeals the summary judgment ruling in Case No. 90-8113, and the costs award in Case No. 90-8535.

CONTENTIONS

Cochran contends that his personal injury and products liability claims fall within maritime jurisdiction because he was exposed to toxic dust while working as a sailor aboard a naval vessel on navigable waters both at sea and at port. Cochran further contends that his claims are not time barred under the Virginia statute of limitations

and that the district court erred in awarding the companies costs. In response, the companies contend that the district court correctly granted their motions for summary judgment on Cochran's assertion of maritime jurisdiction and the Virginia statute of limitations. Additionally, the companies contend that the costs award falls squarely within 28 U.S.C. §1920.

ISSUES

Cochran presents three issues on appeal: (1) whether the district court erred in finding that federal maritime jurisdiction did not encompass his personal injury claims; (2) whether the district court erred in finding that his claims were time barred under the Virginia statute of limitations; and (3) whether the district court correctly awarded the companies $22,118.07 in costs.

DISCUSSION

I. Standard Review

The district court's grant of a motion for summary judgment requires plenary review. *De Cuellar v. Brady*, 881 F.2d 1561, 1565 (11th Cir. 1989). Federal Rule of Civil Procedure 56(c) permits a summary judgment when the pleadings and affidavits establish "no genuine issue as to material facts and the moving party is entitled to judgment as a matter of law." Thus, the Supreme Court has held that rule 56(c) mandates the entry of summary judgment against a party who fails to prove an essential element of the case. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323, 106 S.Ct. 2548, 2552-53, 91 L.Ed.2d 265 (1986).

II. Federal Admiralty and General Maritime Jurisdiction

The judicial power of the United States extends to "all cases of admiralty and maritime jurisdiction." U.S. Const. Art. III, §2. Congress effectuated this judicial grant in 28 U.S.C. §1331 which provides: "The district court shall have original jurisdiction, exclusive of the courts of the States, of . . . [a]ny civil case of admiralty or maritime jurisdiction." Maritime and admiralty jurisdiction of the federal courts traditionally depended upon the locality of the wrong, which required that the incident occur in navigable waters. *See Victory Carriers, Inc. v. Law*, 404 U.S. 202, 92 S.Ct. 418, 30 L.Ed.2d 383 (1971). In 1972, however, the Supreme Court retreated from its "purely mechanical application of the locality test" and stated that the locality test alone did not suffice as a predicate for admiralty jurisdiction. *Executive Jet Aviation, Inc. v. City of Cleveland*, 409 U.S. 249, 261, 93 S.Ct. 493, 501, 34 L.Ed.2d 454 (1972). The Court of *Executive Jet* did not replace the traditional locality test, but instead added a second prong, and nexus test, requiring a significant relationship between the incident and traditional maritime activity. *Executive Jet*, 409 U.S. at 268, 93 S.Ct. at 504.

Following the Supreme Court's pronouncement, the Fifth Circuit held that admiralty and general maritime jurisdiction required a showing of both location in navigable waters as well as a nexus to traditional maritime activity. *Kelly v. Smith*, 485 F.2d 520, 524 (5th Cir. 1973).[2] In

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[2] An en banc panel of this court adopted the precendent of the Fifth Circuit, as that court existed on September 30, 1981. *Bonner v. City of Prichard*, 661 F.2d 1206, 1209 (11th Cir. 1981).

Kelly, the Fifth Circuit enunciated the following four significant factors in analyzing whether a nexus existed between the activity and traditional maritime jurisdiction: (1) the functions and roles of the parties; (2) the types of vehicle and instrumentalities involved; (3) the causation and type of injury; and, most importantly, (4) the traditional concepts of the role of admiralty law. *Kelly v. Smith*, 485 F.2d at 525. The Supreme Court approved the Fifth Circuit's construction of admiralty jurisdiction in *Foremost Insurance Co. v. Richardson*, 457 U.S. 668, 102 S.Ct. 2654, 73 L.Ed.2d 300 (1982). Thus, this circuit's current inquiry for admiralty tort jurisdiction includes the traditional navigable waters locality test supplemented by the nexus test. *Harville v. Johns-Manville Products Co.*, 731 F.2d 775, 781 (11th Cir. 1984).

In *Harville*, employees of the Alabama Dry Dock and Shipbuilding Company who worked as insulators, pipe fitters, welders, boilermakers, machinists, foremen, and general laborers in the shipyard brought suit against several manufacturers and distributors of asbestos-containing insulation products. The plaintiffs alleged that they suffered a variety of pulmonary diseases as a result of their exposure to asbestos. The court found that the plaintiffs met the locality test for at least that part of their claims which occurred on navigable waters. *Harville*, 731 F.2d at 783. In analyzing the four elements of the nexus test, however, the court found that the plaintiffs failed to prove a sufficient nexus between the activity and maritime jurisdiction because they were land-based workers and the asbestos products involved were not designed and marketed solely for maritime use. *Harville*, 731 F.2d at 785. Specifically, the court noted:

> 'The primary purpose of admiralty jurisdiction is unquestionably the protection of maritime commerce.' *Foremost Insurance*, 457 U.S. at 674, 102 S.Ct. at 2658. Our precedent indicates that '[a]dmiralty jurisdiction in the federal courts was predicated upon the need for a uniform development of the law governing maritime industries.' *Peytavin v. Government Employees Insurance Co.*, 453 F.2d 1121, 1127 (5th Cir. 1972). Disputes not involving these interests are not within the admiralty jurisdiction of the federal courts.

Like the plaintiffs in *Harville*, Cochran clearly satisfies the locality test. Cochran's alleged injuries occurred during his tenure as a sailor aboard the USS Independence while the ship was docked in navigable waters in Norfolk and while the ship was at sea. Thus, this court need only consider whether Cochran satisfied the four elements of the nexus test.

The Nexus Test

In determining whether Cochran's alleged injury bears a significant relationship to traditional maritime activity, this court considers the four factors set out in *Kelly v. Smith*, placing particular emphasis on the fourth factor, traditional concepts of the role of maritime law. *Lewis Charters, Inc. v. Huckins Yacht Corp.*, 871 F.2d 1046, 1051 (11th Cir. 1989).

1. The function and role of the parties.

In *Harville*, the court stated that the proper question in examining the function and role of the parties is "whether the actual tasks the workers perform bear any inherent relationship to maritime activity, that is, whether

the plaintiff's jobs are identical to those undertaken by land-based workers and are connected to maritime affairs merely because performed aboard a ship." *Harville*, at 784. The court in *Harville* found that the plaintiff's role and functions, although related to maritime commerce, did not call for the application of maritime jurisdiction. Unlike the plaintiffs in *Harville*, however, Cochran's job involved tasks that are traditionally performed by seamen. Cochran was a full-time sailor with many duties, one of which was maintaining the ship's deck which allowed storage of aircraft during voyages. Consequently, Cochran's maintenance work allowed the ship to perform as an aircraft carrier.

Additionally, the district court found that at least one of the companies, American Abrasive, designed, marketed, and advertised its products specifically for naval use aboard aircraft carriers. Although this factor is not dispositive of the function and roles of the parties' inquiry, it buttresses Cochran's argument for admiralty jurisdiction.

2. The types of vehicles and instrumentalities involved.

The vehicle involved, the USS Independence, is a navigable vehicle whose function is transportation across navigable waters, a traditional role of water craft. Like the plaintiffs in *Harville*, performing work aboard a ship does not in itself subject personal injury and products liability claims to admiralty jurisdiction, particularly if the instrumentalities involved are not used specifically for maritime purposes. The instrumentality in the instant case, the nonskid floor covering, has several land-based uses including covering locker room floors, steps,

cafeterias, lobbies, and other slippery surfaces. Consequently, Cochran's underlying claims would be no different if he had been working with the nonskid floor covering in a building on land. Thus, the involvement of a navigable vessel is at most tangential and does not directly affect the character of Cochran's claims. *Harville v. Johns-Manville*, 731 F.2d at 785.

3. Causation and type of injury.

The record shows that Cochran performed his deck maintenance duties three to five times per week while the ship was docked in Norfolk, Virginia, and twice a week while the ship was at sea. Thus, like the plaintiffs in *Harville*, Cochran's alleged exposure to the toxic dust occurred mostly while the ship was in port and not engaged in navigation or it function as an aircraft carrier. *See Lewis Charters, Inc. v. Huckins Yacht Corp.*, 871 F.2d at 1051. Furthermore, Cochran suffers from an injury that now afflicts thousands of land-based workers, which militates strongly against application of maritime jurisdiction.

4. Traditional concepts of the role of admiralty law.

In *Executive Jet*, the Supreme Court noted:

> Through long experience, the law of the sea knows how to determine whether a particular ship is seaworthy, and it knows the nature of maintenance and cure. It is concerned with maritime liens, the general average, captures and prizes, limitation of liability, cargo damage, and claims for salvage.

Executive Jet, 409 U.S. at 270, 93 S.Ct. at 505. Although admiralty law provides special protection for seamen,

primarily in the context of rights to maintenance and cure, admiralty jurisdiction is predicated upon the need for a uniform development of laws governing maritime industries. *Executive Jet*, 409 U.S. at 260, 93 S.Ct. at 500-01. *See also Foremost Insurance Co. v. Richardson*, 457 U.S. 668, 677, 102 S.Ct. 2654, 2659, 73 L.Ed.2d 300 (1982). We fail to see how resolution of this case under admiralty and maritime law will have any potential impact on maritime commerce. Cochran cannot show a discernible relationship between his exposure to asbestos and the traditional maritime activities involving navigation or commerce on navigable waters. *Lewis Charter v. Huckins Yacht Corp.*, 871 F.2d 1046, 1052 (11th Cir. 1989). Consequently, we decline to extend admiralty jurisdiction to cover Cochran's claims.[3]

III. Virginia Law

Absent the application of general admiralty and maritime jurisdiction, Cochran's claims can survive only if they were timely filed under Virginia law.[4] In Virginia, a cause of action accrues at the time the damage occurs. *Locke v. Johns-Manville*, 221 Va. 951, 275 S.E.2d 900 (Va. 1981). Cochran testified at trial that he started attributing his lung problems to his duties on the hangar deck as early

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[3] Cochran raises several other arguments regarding the accrual of his action under federal admiralty and maritime jurisdiction. Since we find that maritime jurisdiction is inapplicable to Cochran's claims, we do not address these arguments.

[4] We apply Virginia law since the bulk of Cochran's exposure to toxic dust allegedly occurred while the USS Independence was in port in Norfolk, Virginia. Under Georgia conflict of law rules, the situs of the tort governs the substantive law applied in resolving the tort. *Taylor v. Murray*, 231 Ga. 852, 204 S.E.2d 747 (Ga. 1974.)

as 1973 when he requested a transfer to the laundry room. The Navy honorably discharged Cochran in 1974. Additionally, medical examination records show that Cochran's lung disease has not changed since 1975. Consequently, under Virginia law, Cochran's cause of action accrued at the latest in 1974, and the two-year statute of limitations barred Cochran's claims as of 1976.

Cochran relies, however, on the 1985 amendment to the Virginia code which recognizes the long latency period of asbestos-related diseases and thus provides:

> Actions for injuries to the person resulting from exposure to asbestos or products containing asbestos, when a diagnosis of asbestosis, interstitial fibrosis, mesothelioma or other disabling asbestos-related injury or disease is first communicated to the person or his agent by a physician.

Va. Code §8.01-249(4) (1985). Using this provision, Cochran argues that he was not told of his asbestos-related lung problems until 1987. Therefore, his cause of action was timely filed under the Virginia statute in 1987.

We note that only two of the companies involved, Palmer International and American Abrasive Metal Company, produced a nonskid covering containing asbestos. Thus, Cochran's lawsuit against the other companies, Devoe, Hoechst, and Grow, were not timely filed under the Virginia statute. Furthermore, Cochran cannot rely on Virginia Code §8.01-249(4) to extend the statute of limitations in this case against American Abrasive Metals and Palmer International. As stated earlier, Cochran's claim accrued as of 1974, eleven years prior to the enactment of Virginia Code §8.01-249(4).

Although Virginia law offers no direct authority relating to cases such as Cochran's, a recent Virginia Supreme Court opinion questions whether section 8.01-249(4) should apply retroactively. *Roller v. Basic Constr. Co.*, 238 Va. 321, 384 S.E.2d 323 (Va. 1989). In *Roller*, the plaintiff filed a claim in 1983 under the workers' compensation statute following her husband's death from asbestosis. Plaintiff's husband was last exposed to asbestos in 1977, but was not diagnosed with occupationally-related asbestosis until 1983. In allowing plaintiff to apply Virginia Code 1950, section 65.1-52 retroactively, the court reasoned that in the workers' compensation setting, a statute of repose, such as section 65.1-52 would not extinguish a preexisting cause of action if applied retroactively. *Roller v. Basic Const. Co.*, 238 Va. at 330, 384 S.E.2d at 327. Furthermore, the Virginia court stated:

> In any case arising within the traditional tort system, a cause of action arose when alleged wrongful or negligent acts were done, even though rights of actions may not have vested in individual plaintiffs until a later time.

Roller v. Basic Const. Co., 238 Va. at 330, 384 S.E.2d at 327. Since Cochran's claims are within the traditional tort system, Virginia law would not apply a statute of repose, such as section 8.01-249(4) retroactively to his claims. Accordingly, Cochran's reliance on this statute is misplaced, and the district court correctly granted the companies' motions for summary judgment.

IV. Costs

Cochran next contends that the district court incorrectly awarded the companies $22,118.07 in costs. According to Cochran, the companies failed to establish

that the costs were allowable under 28 U.S.C. §1920.[5] Specifically, Cochran takes issue with the companies' assessment of copying costs, witness fees, and deposition fees. Cochran argues that the costs were grossly inflated, and the district court's ruling in the companies' favor has a chilling effect on plaintiffs such as himself, a retired navy sailor.

This court refuses to disturb a cost award unless clear abuse of discretion is shown. *Tanker Management, Inc. v. Brunson*, 918 F.2d 1524, 1527 (11th Cir. 1990). Litigation costs are taxable under Federal Rule of Civil Procedure 54(d) which provides "that costs shall be allowed as a matter of course to the prevailing party." Additionally, 28 U.S.C. §1920 specifies what costs may be properly taxed against the nonprevailing party.

The district court awarded American Abrasive $3,080.58 in costs, Palmer International $2,237.36, and

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[5] Title 28 U.S.C. § 1920 provides:
Taxation of costs
A judge or clerk of any court of the United States may tax as costs the following:
(1) Fees of the clerk and marshal;
(2) Fees of the court reporter for all or any part of the stenographic transcript necessarily obtained for use in the case;
(3) Fees and disbursements for printing ad witnesses;
(4) Fees for exemplification and copies of papers necessarily obtained for use in the case;
(5) Docket fees under section 1923 of this title;
(6) Compensation of court appointed experts, compensation of interpreters, and salaries, fees, expenses, and costs of special interpretation services under section 1828 of this title.
A bill of costs shall be filed in the case and, upon allowance, included in the judgment or decree.
(West 1966 & Supp.1991).

Devoe $16,800.13, for a total of $22,118.07. The costs awarded to the companies fall squarely within the provisions of 28 U.S.C. §1920. Since the companies were the prevailing parties, the district court correctly awarded them costs under rule 54(d). Cochran argues that the district court failed to scrutinize the claimed costs. He did not offer to the district court and does not offer to this court any factual support for this argument. Thus, finding no abuse of discretion, we affirm the district court's cost award.

CONCLUSION

Because Cochran's claims are not cognizable under federal maritime jurisdiction, we find no justification to supplant Virginia state law with substantive admiralty law. Additionally, Cochran's claims are barred under the Virginia state statutes because his cause of action accrued as early as 1974, and he did not file suite until 1987. Likewise, Cochran's claims do not fall within the 1985 amendment to the Virginia Code. Additionally, the district court did not abuse its discretion in awarding the companies costs. Accordingly, we affirm the district court.

AFFIRMED.

APPENDIX C

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

JERRY COCHRAN and	:	
GERALDINE COCHRAN	:	
	:	
vs.	:	CIVIL NO.
	:	1:87-cv-1464-ODE
AMERICAN ABRASIVE	:	
METALS CO.,	:	
DEVOE AND RAYNOLDS CO., INC.,	:	
HOECHST CELANESE		
CORPORATION	:	
GROW GROUP, INC., PALMER	:	
INTERNATIONAL, INC.	:	
CIBA-GEIGY CORPORATION	:	

ORDER

This personal injury action is before the court on Plaintiff's motion for reconsideration.

On November 2, 1989, this court granted Defendants' motion for summary judgment, finding that the statute of limitations barred Mr. Cochran's claim. This determination was based on Mr. Cochran's testimony that his symptoms arose in 1973 and on evidence from the

medical records that pinpointed their onset at least by 1974.[1]

Plaintiffs move for reconsideration on the ground that this order contains a mistake of fact. Plaintiffs argue that the court should vacate the November 2 order because it contains a footnote referring to Plaintiff Jerry Cochran's testimony that he had been diagnosed in the Navy with silicosis.[2] Plaintiff notes that these references to silicosis were changed by the court reporter to sarcoidosis over one month after Mr. Cochran signed the errata sheet, at the instigation of the Plaintiffs' counsel.

Solely in order to correct this error, Plaintiffs' motion is GRANTED insofar as it relates to Mr. Cochran's testimony that he received a diagnosis of silicosis while in the Navy; the above stated footnote and the sentence in the text to which it is attached shall be deleted in their entirety from this court's order of November 2, 1989. Inasmuch as the deletion of this information in no way affects the reasoning or the result of that order, Plaintiffs' motion for reconsideration otherwise is DENIED.

Accordingly, Plaintiffs' motion for reconsideration is GRANTED IN PART and DENIED IN PART.

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[1] In this case, the court applied a two-year statute of limitations which accrues under Virginia law when the damage occurs. *Locke v. Johns Manville*, 221 Va. 951 (1981).

[2] This footnote states:

> Twice in his deposition Mr. Cochran stated that he had been diagnosed in the Navy with silicosis. The errata sheet, which he signed, does not reflect that this is an error. However, the medical records submitted by the parties do not reflect this diagnosis at that time.

SO ORDERED, this 4 day of January, 1990.

Orinda D. Evans
UNITED STATES DISTRICT JUDGE

APPENDIX D

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

JERRY COCHRAN and
GERALDINE COCHRAN

vs. CIVIL NO.
1:87-cv-1464-ODE

AMERICAN ABRASIVE
METALS CO.,
DEVOE AND RAYNOLDS CO., INC.,
HOECHST CELANESE
CORPORATION,
GROW GROUP, INC.,
PALMER INTERNATIONAL, INC.
REN PLASTICS.,
CIBA-GEIGY CORPORATION

ORDER

This personal injury action is before the court on motions for summary judgment asserted by Defendants Devoe and Raynolds Co., Inc., Hoechst Celanese Corporation, Grow Group, Inc., Palmer International, Inc. and American Abrasive Metals Co. These Defendants request oral argument and move for reconsideration of this court's order of August 25, 1989.

Plaintiff Jerry Cochran entered the Navy in 1972 at age nineteen. In late 1972, he was assigned to the deck grinding crew of the U.S.S. Independence, an aircraft carrier based in Norfolk, Virginia. His job involved maintenance of the

nonskid floor coating on the hangar deck, where aircraft were stored during voyages. Nonskid floor coating covered the entire hangar deck, which extended the approximate length of two football fields and was located below the flight deck.

Mr. Cochran's duties required him to patch worn areas of nonskid floor covering, grinding it down, sweeping it up and occasionally reapplying it. Mr. Cochran testified at his deposition that while the ship was in port in Norfolk, for a period of nine months, he spent an average of three to five days per week on grinding duty. He stated that when the ship was at sea on maneuvers he spent an average of two days per week on grinding duty. Plaintiffs contend that this duty generated dust containing the components of Defendants' products, which damaged Mr. Cochran's lungs. They filed this action on June 30, 1987.

Plaintiffs contend that there were only four suppliers on nonskid coating which conformed to the Navy's specifications during the operative time frame. According to Plaintiffs, the suppliers were Defendants American Abrasive Metals Co. ("American Abrasive"), Devoe and Raynolds Co., Inc. ("Devoe"), Palmer Products, Inc. ("Palmer") and Ren Plastics ("Ren").[1] Mr. Cochran's supervisor in the Navy attested that he recalled the use of products manufactured by American Abrasive, Devoe and Palmer on the hangar deck between 1970 and 1973. Plaintiffs allege and the record reflects that the products of these Defendants contained silica and that those

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[1] This court entered an order dismissing Ren and Ciba-Geigy Corp. on April 14, 1989.

manufactured by American Abrasive and Palmer contained asbestos as well. However, Mr. Cochran attested that he could not identify any specific products to which he was exposed, although he remembered seeing the name "Epoxo" on some containers and the name "Devoe" somewhere, but he could not recall the location.[2]

Mr. Cochran testified that after about six months on the grinding crew, he began to experience dizziness, chest pain, dyspnea, and hemoptysis. Mr. Cochran specifically recalled attributing some of his respiratory problems to the dust generated by his job and so informed the medical officer onboard. He stated that he requested a transfer off the grinding crew because of he health problems and was eventually given laundry duty. He stated that he continued to contact the medical officer with his complaints and was sent to another ship for x-rays. Mr. Cochran attested that thereafter he was diagnosed as having silicosis.[3]

In July of 1974, he was flown from the ship to the hospital in Naples, Italy for treatment of nervousness and nonspecific chest and gastrointestinal pain. He was later sent to Pensacola, Florida for treatment. In the summer of 1974, Navy doctors diagnosed him as having sarcoidosis, a lung disease of unknown etiology. Plaintiff testified that he remained hospitalized for approximately nine months.

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[2] Defendent American Abrasive manufactured a product by the name of Epoxo.

[3] Twice in his deposition Mr. Cochran stated that he had been diagnosed in the Navy with silicosis. The errata sheet, which he signed, does not reflect that this is an error. However, the medical records submitted by the parties do not reflect this diagnosis at that time.

He received treatment for lung dysfunction and anxiety neurosis.

After a medical discharge from the Navy in 1975, Mr. Cochran returned to his home in Albany, Georgia. That year he spent several months in the Veterans Hospital in Decatur, Georgia, mainly for treatment of psychiatric disorders purportedly related to anxiety about his lung condition. He received diagnoses of sarcoidosis from various sources from 1975 to 1979 and a diagnosis of schizophrenia in 1977.

In 1978, Mr. Cochran married Plaintiff Geraldine Cochran. Both before and after his marriage, Mr. Cochran continued to seek treatment for his pulmonary symptoms. He has not worked since his discharge from the Navy. He smoked approximately one and one half packs of cigarettes per day from 1969 to 1979. Mr. Cochran has received compensation for medical disability from the Navy from 1975 to the present and social security benefits since 1977.

The medical records indicate that beginning at least in 1978, Mr. Cochran attributed his lung problems to his military duty. During the psychiatric evaluation in 1978, Mr. Cochran stated that he felt his lung problems were related to his Naval service.

In 1982, he told another doctor that he felt that exposure to trichloroethylene, solvents involved in his grinding duties, or benzene, which was used in the ship's laundry, might have harmed him. This doctor stated that Mr. Cochran informed him that he had undergone a bronchoscopy and been told that he did not have sarcoidosis. This 1982 report also indicates that Mr. Cochran stated that he had devoted his life to carrying out

research and forming an organization to pursue the hazards of trichlorethylene and benzene. According to the report, Mr. Cochran brought numerous scientific reprints and letters with him to the exam. The result of this exam was a diagnosis of possible sarcoidosis.

Medical records from a January 1984 exam indicate that Plaintiff had consulted with a Texas toxicologist in March of 1982, who found several solvents present in his system. These records state that a diagnosis of toxic brain syndrome was the result of that research.[4] These records also indicate that beryllium exposure might have produced some of Mr. Cochran's symptoms.

In February 1984, a tissue analysis at the Armed Services Institute of Pathology revealed silica particles in lymph node tissue. In a March, 1984 report to Mr. Cochran, the Department of the Navy stated that there was no evidence of beryllium in his tissue and the presence of the silica particles in his lymph nodes could not be related to occupational exposure in the Navy because the nonskid paint he had used contained silicon carbide. This report also indicated that a review of chest films from 1974 to 1982 revealed no abnormalities attributable to silica.

In December of 1985, Mr. Cochran went to the Emory Clinic for a workup. This report indicates that he related the onset of his pulmonary symptoms to his transfer to the laundry of the ship, where he claimed to have been

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[4] A record review in April of 1989 indicates that the Naval Environmental Health Center had concluded that the toxicologist's diagnostic approach, diagnosis and treatment recommendations did not conform to generally accepted medical practice.

exposed to benzene. He also stated that the laundry apparently was near an area where sandblasting was occurring. A review of chest films indicated no progression of Mr. Cochran's lung condition from 1975. The record also suggests that his effort in performing pulmonary function tests was questionable during this exam and during testing in 1980.

In September, 1986 discharge summary from the Veterans Administration Hospital indicated that Mr. Cochran was competent and able to work.

Mr. Cochran underwent an elective transbronchial biopsy of the lower left lung in May of 1987. A report from the staff pathologist at the Veterans Administration Hospital indicated that he saw no change from the biopsy performed in 1984. After examination of this tissue, several physicians from the Armed Forces Institute of Pathology found no diagnostic pathological abnormality.

In an August, 1987 medical summary, a staff physician from the Veterans Administration recommended that Mr. Cochran be reevaluated for service connected disability; he suggested that the disorder was likely to have been silicosis rather than sarcoidosis.

A late 1987 review of Mr. Cochran's medical records, issued by a physician at the request of Plaintiffs' attorney, garnered a diagnosis of non-specific pneumoconiosis. This doctor noted that Mr. Cochran's lungs had been damaged on one occasion and had remained in the same condition since. He reported that the numerous x-rays he reviewed had no variations of disease severity or distribution. In observing some slight bilateral pleural thickening on x-ray, he also raised the issue of whether asbestosis was present;

however, he noted that the heart was not enlarged as he believed would be the case with that disease. He noted that tissue sections showed marked interstitial lung disease with severe fibrotic changes. In his deposition on May 14, 1989, this doctor stated that if he had thought silicosis or asbestosis was pathologically present in the lung tissue he examined, he would have said so.

In April of 1988, Mr. Cochran received a diagnosis of probable silicosis from the Veterans Administration.

Two radiographic reviews of Mr. Cochran's chest films in 1989 performed at Defendants' request, indicate that his condition has not changed substantially in the last fifteen years.

Defendants move for summary judgment.[5] They argue that this court should apply Georgia's statute of limitations and the Virginia rule as to when causes of action accrue to find that Plaintiffs' claims are time-barred. They maintain that Virginia law applies because Mr. Cochran's exposure occurred there. They contend that under Virginia law, the statute of limitations begins to run when damage occurs, which in this case was in 1974, when Mr. Cochran first experienced pulmonary dysfunction. Defendants maintain that even if the claim accrued on the date of discovery, it is barred because silica was found on biopsy in February of 1984 and Plaintiffs were so informed.

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[5] Defendants Grow Group, Inc., Hoechst Celanese and Devoe move jointly. Defendents American Abrasive and Palmer have filed separate motions. Inasmuch as many of their arguments are substantially the same, the court will refer to Defendants collectively, unless stated otherwise.

Thus, Defendants argue that Georgia's two year statute of limitations for tort claims expired long before Plaintiffs filed their complaint in 1987.[6]

Defendants also content that Virginia's statute exempting asbestos-related claims from its statute of limitations accrual rule does not apply because it refers only to asbestos-related claims, not silica-related claims. Moreover, Defendants argue that since Plaintiffs' claims accrued before 1985, when this provision was enacted, it should not be applied retroactively.[7]

In addition, Defendants contend that Virginia law rejects loss of consortium claims premised on negligent injuries. They also maintain that Mrs. Cochran's claim is barred because the evidence reveals that her husband's condition existed prior to their marriage and has not changed. They argue that no action exists for premarital injuries to a spouse and moreover, she has experienced no loss. Defendants assert that her claim is time-barred in that, if it ever existed, it accrued two years after the date of their marriage.

Defendant Palmer further argues that Plaintiffs' claim is barred by the government contractor defense because its product met the Navy's reasonably precise specifications, it had no knowledge of any risk associated with the use of its

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[6] Defendants Hoechst Celanese Corporation, Devoe and Grow Group, Inc. jointly argue that since Plaintiffs did not sue them until May of 1988, this argument is even stronger in their cases.

[7] Defendants Hoechst Celanese Corporation, Devoe and Grow Group, Inc. jointly argue that since their products did not contain asbestos, this statute could not apply in their cases.

product and consequently could not warn the government about it. Palmer also contends that Plaintiffs have not presented any evidence of exposure to its product; in fact, the retired Naval officer in charge of the hangar deck in 1974 testified that he did not remember Palmer products being used and the chief petty officer in charge of the hangar deck from 1970 to 1973 testified that only five to ten percent of the products used on the deck were manufactured by Palmer. Palmer argues that this evidence is insufficient to withstand its motion because the petty officer cannot identify a specific year its product was used, much less a specific location in the hangar deck where Mr. Cochran actually worked in proximity with its product.

Defendants Hoechst Celanese Corporation, Devoe and Grow Group, Inc. jointly argue that there is no evidence that Mr. Cochran was exposed to their products. They assert that Mr. Cochran said that the products he used were applied by a roller and they sold products applied by spraying. They also maintain that the chief petty officer's testimony that Devoe's product was used in 1972 aboard the U.S.S. Independence, probably only on the flight deck, is insufficient because he could not identify where the product was used or place Mr. Cochran in proximity to it.

In response, Plaintiffs argue that this action was timely filed as to Defendants American Abrasive and Palmer under Virginia law because no doctor told Mr. Cochran he had an asbestos related disease prior to 1987. Plaintiffs contend that since Devoe's product contributed to Mr. Cochran's illness, this action was likewise timely filed against it.

Plaintiffs also maintain that admiralty law, with its three year statute of limitations, applies because Mr. Cochran was a sailor, the exposure occurred in a maritime locale and was connected with traditional maritime matter, the maintenance of a vessel at sea.[8] According to Plaintiffs, under federal maritime law their cause of action accrued on discovery of the cause of the injury. Plaintiffs contend that they did not have the critical facts on the cause of the illness until 1987. They also argue that when they knew or should have known is a jury question.

Plaintiffs also maintain that the government contractor defense does not apply because the Navy's specifications in this case were too general and the government had no discretion over the product formulas used and did not require the inclusion of silica or asbestos.

Plaintiffs urge the court in applying admiralty law to employ the theory of enterprise liability. They claim Defendants all breached a duty to Plaintiffs of similar and concurrent quality which combined to injury Mr. Cochran. Thus, they claim specific identification to each product is unnecessary.

In reply, Palmer asserts that exercise of admiralty jurisdiction in this case offends traditional notions of the role of federal maritime law. Palmer maintains that admiralty law is predicated on the need for uniformity in the laws governing the shipping industry and nothing in this case implicates that interest. Palmer also contends that nothing in Plaintiffs' claims would be different had his

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[8] The parties consented to allow Plaintiffs to amend their complaint to assert admiralty jurisdiction.

alleged exposure occurred on land and that state law is designed to handle such claims.

Defendants Hoechst Celanese Corporation, Devoe and Grow Group, Inc. argue that since their products did not contain asbestos, the Virginia accrual statute does not apply to them. Thus, they maintain that this cause of action accrued in 1974, when silica was found in Mr. Cochran's lymph nodes.

They also assert that enterprise liability is a theory Virginia law does not recognize. Moreover, they argue that since their product did not contain asbestos, they could not have breached a similar and concurrent duty to Plaintiffs.

In deciding Defendants' motion for summary judgment, the court must consider whether Plaintiffs have offered evidence sufficient to support their claims. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). Summary judgment is appropriate only if the evidence, viewed in the light most favorable to the Plaintiffs, establishes that there are no genuine issues of material fact to be tried and that Defendants are entitled to judgment as a matter of law. *Carlin Communication v. Southern Bell*, 802 F.2d 1352 (11th Cir. 1986).

The court turns first to the choice of law issue. The mere allegation of admiralty jurisdiction in a complaint is insufficient to invoke the use of maritime law. *Smith v. Pinell*, 597 F.2d 994 (5th Cir. 1979). Nor does the mere fact that an injury occurs on navigable waters necessarily require the application of admiralty law. *Executive Jet Aviation v. City of Cleveland*, 409 U.S. 249 (1972).

The touchstone in deciding this issue is whether the case involves a significant relationship to maritime activity. *Executive Jet* at 258. Determining the sufficiency of this nexus requires consideration of "the functions and roles of the parties; the types of vehicles and instrumentalities involved; the causation and the type of injury; and the traditional concepts of the role of admiralty law." *Harville v. Johns Manville Products Corp.*, 731 F.2d 775 (11th Cir. 1984) (quoting *Kelly v. Smith*, 485 F.2d 520 (5th Cir. 1973), *cert. denied*, 416 U.S. 969 (1974); *Oman v. Johns Manville Corp.*, 764 F.2d 224, 230 (4th Cir. 1985), *cert. denied*, 474 U.S. 970 (1985) (adopting the *Harville* analysis).[9] Of these factors, the last is "clearly the most important." *Harville* at 785.

In applying this analysis, many courts have ruled that land based workers exposed to insulating materials and other products aboard ships do not meet the requisites for admiralty jurisdiction. *See Harville* at 786; *Lingo v. Great Lakes Dredge & Dock Co.*, 638 F. Supp. 30, 31 (E.D. N.Y. 1986). That determination is equally applicable to the circumstances of this case.

In *Harville*, the Eleventh Circuit held that there was little support for the application of maritime jurisdiction in a shipyard worker's personal injury claim against manufacturers and distributors of asbestos containing insulation products. *Harville* at 786. In analyzing the function and roles of each of the parties, it found that the Defendants' products were not designed specifically for

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[9] The parties appear to agree that if this court does not apply admiralty law, then use of Virginia law is appropriate, as the injury allegedly occurred there.

maritime use, which militated against the extension of maritime jurisdiction. *Id.* at 784. The question addressed in evaluating Plaintiffs' role was whether their jobs were "identical to those undertaken by land-based workers and are connected to maritime affairs merely because performed aboard ship, or whether they are tasks somehow unique to maritime service or work traditionally done by seamen." *Id.* at 784-785. The Court found that the involvement of the ship was at best tangential because nothing about the claims would be different had the exposure occurred on land. *Id.* It likewise saw nothing uniquely maritime in the use of asbestos insulation or in the causation or nature of the alleged injuries. *Id.* Finally, the court determined that traditional concepts of admiralty law, the most important factor, were not concerned with such claims. *Id.* at 786.

As to the rolls of the parties, the instant case is distinguishable in that the record indicates that at least one Defendant, American Abrasive, "designed, marketed and advertised" its product specifically for Naval use aboard aircraft carriers. *Oman*, 764 F.2d at 230. Moreover, Mr. Cochran, in maintaining the deck, was a seaman performing traditional maritime duties.

However, the *Harville* conclusions as to the types of vehicles and instrumentalities involved and the causation and type of injury apply equally to the facts in this case. The record indicates that the use of these non-skid floor coverings was not confined strictly to ships, but was advertised as ideal for locker rooms, steps, cafeterias, lobbies and other areas. Consequently, the fact that the products were applied aboard ship is "at most tangential and has no [more] effect on the character of the plaintiffs'

claims" than the use of insulation materials specifically designed for covering pipes aboard ship. *Harville* at 785; *Oman* at 230 (declining to apply admiralty law although pipecovering, specifically designed, advertised and marketed for shipboard use, favored extension of admiralty jurisdiction).

Moreover, the record indicates that much of Mr. Cochran's exposure occurred while the ship was docked in Norfolk, indicating that he did not receive a special kind of exposure uniquely tied to the maritime situs of his alleged exposure. *Cf. Lingo v. Great Lakes Dredge & Dock Co.*, 638 F. Supp. at 32 n.2 (observing that exposure to asbestos in the engine room of a ship was uniquely maritime, but declining to exercise admiralty jurisdiction under Second Circuit law). As in *Harville*, the non-maritime nature and cause of the alleged injury also weigh against use of admiralty law.

Turning to the most important factor, traditional concepts of the role of admiralty law, the court finds that "the resolution of these tort claims does not 'require the special expertise of the court in admiralty as to navigation or water-based commerce, nor is there any federal interest in uniformity of decision requiring the application of federal substantive law.'" *Oman* at 232 (quoting *Myhran v. Johns Manville*, 741 F.2d 1119, 1122 (9th Cir. 1984). Although "[f]rom its dawn" admiralty law has provided special protections for seamen, this has been primarily in the context of the right to maintenance and cure, which is confined to actions against ship owners, not in product liability cases. *Executive Jet*, 409 U.S. at 260 (quoting *O'Donnell v. Great Lakes Dredge & Dock Co.*, 318 U.S. 36 (1943); *see Fordham v. Belcher Towing Co.*, 710 F.2d 709

(11th Cir. 1983) (requiring application of the equitable doctrine of laches to determine whether case is time-barred under 46 U.S.C. §763a).

Nothing in the substance of this product liability claim mandates application of admiralty law and state law in this area is well developed. Thus, "the federal interest in these claims is insufficient to justify federal courts supplanting state law with the federal common law of admiralty." *Id.* Consequently, the court will apply Georgia's two year statute of limitations for torts and the Virginia law of accrual.[10] O.C.G.A. §9-3-33; *Cash v. Armco Steel Corp.*, 462 F. Supp. 272 (N.D. Ga. 1978).

In most circumstances a cause of action accrues under Virginia law when the damage occurs. *Locke v. Johns Manville*, 221 Va. 951 (1981). This "is to be established from available competent evidence...that pinpoints the precise date of injury with a reasonable degree of medical certainty." *Id.* at 959. Moreover, Virginia law embraces the rule of indivisible personal injury. *Joyce*, 591 F. Supp. at 452. This rule states that "the limitations period begins to run when the initial injury, even if relatively slight, is sustained, and the manifestation of more substantial injuries at a later date does not extend the limitations period." *Id.* (quoting *Large v. Bucyrus-Erie Co.*, 524 F. Supp. 285, 289 (E.D. Va. 1981), *aff'd*, 707 F.2d 94 (4th Cir. 1983)).

Applying these rules to the instant facts, the court finds that, in light of the medical evidence and Mr.

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[10] Under the Georgia conflict of law rules, the forum law governs procedural matters, while the law of the situs of the tort controls substantively. *Taylor v. Murray*, 231 Ga. 852 (1974).

Cochran's own testimony, this case would have been time-barred in 1976. Mr. Cochran testified that his symptoms arose in 1973 and the medical records pinpoint their onset at least by 1974. At the time, Mr. Cochran stated that he attributed their onset to his grinding duties and requested a transfer. Consequently, the accrual point under Virginia law, when the damage occurred, was in 1974 at the latest.

However, in 1985, the Virginia General Assembly implicitly recognized the harshness of this rule in cases of asbestos-related disease, which is characterized by its long latency period where both the symptoms and the diagnosis may not become apparent for years following the exposure. *See Joyce v. A.C. & S., Inc.*, 591 F. Supp. 449 (W.D. Va. 1984), *aff'd*, 785 F.2d 1200 (4th Cir. 1986).[11] It provided for the accrual of:

> ...actions for injuries to the person resulting from exposure to asbestos or products containing asbestos, when a diagnosis of asbestosis, interstitial fibrosis, mesothelioma or other disabling asbestos-related injury or disease is first communicated to the person or his agent by a physician. Va. Code §8.01-249(4) (1985).

There is little case law applying this amendment. It is clear that Virginia courts do not apply this amendment retroactively. This means that the amendment only applies to cases filed after its effective date, July 1, 1985. *See*

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[11] Because the product manufactured by Defendants Devoe, Hoechst Celanese and Grow Group never contained asbestos, Plaintiffs' entire claim against them is time-barred, whether the amendment is applied or not.

In re FELA Asbestos Cases, 646 F. Supp. 610 (W.D. Va. 1985).

However, Virginia law appears to offer no direct authority relating to cases like this, where the case was filed after the amendment, the symptoms arose long before it was enacted, and the pathological diagnosis of interstitial fibrosis was not made until after the amendment became effective.[12] But a recent workers compensation case casts doubt on whether a Virginia court would apply the amendment under the facts in this case. *Roller v. Basic Construction Co.*, No. 870400 (Va. Sept. 22, 1989).

In *Roller* the Court distinguished between the application of a special statute of limitations for asbestos claims in a workers compensation case and in cases sounding in tort. It stated

> In any case arising within the traditional tort system, a cause of action arose when alleged wrongful or negligent acts were done, even though rights of action might not have vested in individual plaintiffs until a later time. The statute of repose had the effect of extinguishing those causes of action [two]...years after they arose, creating a substantive right of repose in the

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[12] Defendants' reliance on *Saunders v. H.K. Porter Co.*, 643 F. Supp. 198 (E.D. Va. 1986), *rev'd on other grounds sub nom., Grimes v. Owens Corning Fiberglass Corp.*, 843 F.2d 815 (4th Cir.), *cert denied*, __U.S.__, 109 S. Ct. 221 (1988) for the proposition that the amendment does not apply in this case is misplaced, in that *Grimes* specifically declined to address that issue in reversing *Saunders*. Moreover, the *Saunders* case, unlike this one, was filed before the enactment of the amendment.

potential defendants which subsequent legislatures could not abridge. *Id.*

In Virginia, "statutes of limitation are statutes of repose, the object of which is to compel the exercise of a right of action within a reasonable time... [They] are primarily designed to assure fairness to defendants..." *Atkins v. Schmutz Manufacturing Co.*, 435 F.2d 527, 530 n. 16 (4th Cir. 1970), *cert. denied*, 402 U.S. 932 (1971). Under Virginia law, a statute of repose is "intended as a substantive definition of rights." *School Board of Norfolk v. U.S. Gypsum*, 234 Va. 32 (1987).

This rule and *Locke* militate against application of the amendment. Thus, it does not appear that a Virginia court would apply the amendment to the facts in this case. *Id.*, 221 Va. at 959.[13] Inasmuch as the claims for damage caused by silica or other materials are time-barred because the above quoted statute only applies to asbestos-related claims, Defendants' motions are GRANTED.

As to Mrs. Cochran's claim for loss of consortium, both logic and Georgia law dictate that it must fail.[14] The

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[13] Moreover, from a purely pragmatic perspective, applicaton of the amendment would not appear to further its purpose, which presumably was to avoid the inequity of barring claimants whose slowly progressing "latent" disease may be radiographically or pathologically discoverable years before any actual symptoms are manifested. *See Joyce*, 591 F. Supp. at 452. Under Virginia law prior to the amendment, if medical testimony demonstrated that the damage manifested itself before the disease becomes symtomatic, the statute of limitations began to run at the earlier time. *Locke*, 221 Va. at 959. The facts in the instant case, where Mr. Cochran's symptoms arose in 1973, do not appear to implicate the concerns addressed by the amendment.

[14] The situs of the marriage and thus the alleged loss of consortium is Georgia; therefore, Georgia law will be applied.

records indicate that Mr. Cochran's symptoms commenced in 1973; he received a medical discharge in 1975 and has not worked since then. When he married in 1978, his condition was essentially unchanged. Since then, medical records indicate, if anything, some improvement in his physical condition. A critical element in a loss of consortium claim is damage. *Jones v. Beasley*, 476 F. Supp. 116 (M.D. Ga. 1979). Inasmuch as the alleged injury occurred before the marriage, Mrs. Cochran has experienced no loss.

Plaintiffs had an opportunity to address the substance of loss of consortium issue in their response to American Abrasive's motion, which raises this argument. However, they did not. Consequently, no genuine issues of material fact remain to be tried on this issue. *Celotex Corp v. Catrett*, 477 U.S. 317 (1986).

Inasmuch as the parties jointed in a consent order address the issues ruled on in this court's order of August 25, 1989, Defendants' motions for reconsideration are DISMISSED as moot.

Accordingly, Defendants' motions for summary judgment are GRANTED. Defendants' requests for oral argument are DENIED. Defendants' motions for reconsideration are DISMISSED as moot.

SO ORDERED, this 2 day of November, 1989.

ORINDA D. EVANS
UNITED STATES DISTRICT JUDGE

AFFIDAVIT

Personally appeared before the undersigned officer, duly authorized to administer oaths, JERRY COCHRAN, who after being first duly sworn, deposes and says:

1. That Affiant was a sailor in the U.S. Navy aboard the vessel U.S.S. INDEPENDENCE from late 1972 until early-1974 in the U.S. Navy.

2. That Affiant was ship's company during his assignment to the U.S.S. INDEPENDENCE and always lived aboard the vessel during his assignment there.

3. That during the time Affiant was in the grinding crew aboard the U.S.S. INDEPENDENCE, Affiant also had other duties including daily four hour Konflag watch duty; while at dock, was in pier watch; while at sea was a chock and chain man for securing planes in the hangar deck aboard said vessel, moving planes to the elevator for lifting to the flight deck and moving planes back to position on the hangar deck after they are lowered by a elevator to the hangar deck, and as a radio operator in communication with damage control central from Konglag 1 during general quarters at which time the vessel was in battle readiness both in drills and in at least one live situation.

4. That Affiant was never told he had silicosis or any occupationally related lung disease while in the U.S. Navy or at any time before 1987.

5. That Affiant did not know the dust created during the grinding, sweeping, and shoveling of the nonskid coating from the hangar deck on the U.S.S.

INDEPENDENCE could cause serious or permanent injury and only thought the dust was irritating him.

6. That this Affidavit is given on Affiant's personal knowledge.

AND FURTHER AFFIANT SAYETH NOT.

_____

JERRY COCHRAN

Sworn to and subscribed
before me this _____ day
of _____, 1989.

_____

Notary Public, _____
County, _____

(NOTARIAL SEAL)

APPENDIX E

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

NO. 1:87-CV-1464-OOE

JERRY COCHRAN and
GERALDINE COCHRAN PLAINTIFFS

vs. DEPOSITION FOR PLAINTIFFS

AMERICAN ABRASIVE
METALS CO.,
DEVOE AND RAYNOLDS CO., INC.,
HOECHST CELANESE CORPORATION,
GROW GROUP, INC., PALMER
INTERNATIONAL, INC.
REN PLASTICS, INC.,
CIBA-GEIGY CORPORATION DEFENDANTS

* * * * *

The deposition of HAROLD FLEGENHEIMER was taken in behalf of the Plaintiffs, before Douglas R. Wilson, Notary Public for the State of Kentucky at Large, in the King Pallor Room #370, Holiday Inn Hurstbourne, Louisville, Kentucky, on May 2, 1989, at the hour of 10:30 a.m. Said deposition was taken pursuant to notice for purposes of discovery and as provided by the Federal Rules of Civil Procedure.

A No.

Q Well, isn't it true that Devran 237M was developed with the intent of marketing it to the U.S. Navy for use on its ships?

MR. PARNELL: If you know.

A What was the question?

Q Isn't it true that Devran 237M was developed for marketing to the U.S. Navy for use on its ships?

MR. PARNELL: And I said you may answer that if you know.

A I think that is true.

Q Now, isn't it true that MIL-D-23003 is a performance specification?

A It is a performance specification. But as I mentioned earlier, some of the performance requirements are very specific to the Navy, and only the Navy can judge whether it meets the performance or not.

Q But specifications don't tell you what type of products to use in the product to meet those specifications, do they?

A No, other than it specifies that it is an epoxy coating, which tells you what to put in.

Q Okay. And in regard to that epoxy coating you are speaking of some type of polymer?

APPENDIX F

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

JERRY COCHRAN and	:	
GERALDINE COCHRAN	:	
Plaintiffs	:	
vs.	:	CIVIL NO.
	:	1:87-CV-1464-JTC
AMERICAN ABRASIVE	:	
METALS CO.;	:	
DEVOE AND RAYNOLDS CO., INC.;	:	
HOECHST CELANESE		
CORPORATION;	:	
GROW GROUP, INC.; PALMER	:	
INTERNATIONAL, INC.;	:	
REN PLASTICS, INC.;		
CIBA-GEIGY CORPORATION	Defendants	

Tuesday, March 28, 1989

Deposition of STEPHEN T. PALMER, JR., held at the Holiday Inn, 13th and Walnut Street, Room 2008, Philadelphia, Pennsylvania, commencing at 9:15 a.m., on the above date, before Cynthia L. Simpson, Registered Professional Reporter and Notary Public.

BLUM-MOORE REPORTING SERVICES, INC.
350 S. Main Street, Suite 203
Doylestown, Pennsylvania 18901
(215) 345-7966

BY MR. BROOKS:

Q Mr. Palmer, are you aware that any products whatsoever were sold in the State of Virginia during the 1970's?

A I would have had to be aware of it, at that time.

Q Why is that?

A Because of my position at Palmer Products.

Q What was your position then? I believe you were President and Treasurer beginning in '71 and in '73 became President and Chairman of the Board?

A Yes.

Q So, as I understand it, you were aware that products of Palmer International were being used in Virginia during that period or time?

A My answer is that since we did sell to the Navy, I would have had to know that we were shipping to many areas.

Q Was one of those areas Norfolk, Virginia?

A To the best of my knowledge, yes.

Q Was the U.S. Navy a continuous and regular customer of Palmer Products in the 1970's?

A Yes, they were.

Q Do you recall if products sold to the U.S. Navy, were sold directly to the Navy?

A Yes. I might say this. That the two ways that you could sell this material, General Services Administration or straight to the Navy.

Q Do you know how products of Palmer Products were sold to the U.S. Navy during the 1970's? In other words, were they sold straight to the U.S. Navy or through the GSA?

A Both.

Q Do you recall whether the products of Palmer International were either used by — excuse me, let me rephrase the question.

Do you know if the products which were manufactured and sold by Palmer Products for use by the U.S. Navy, were ever shipped straight to Norfolk, Virginia by Palmer Products?

A Could you repeat that first part of the question, please?

Q Do you know if products made and sold by Palmer Products were ever shipped directly to the U.S. Navy in Norfolk, Virginia?

A There again, since we were doing business with the Navy and GSA, I cannot recall any specific examples, but we probably had to send some products in that manner to that location.

Q During the 1970's, wasn't the Norfolk Naval Shipyard the biggest naval shipyard of the Navy on the East Coast?

A To the best of my knowledge, yes.

Q Was it one of the primary users of products sold by Palmer International or — excuse me — of Palmer Products to the U.S. Navy?

A Repeat that question again.

Q Was the U.S. Navy in Norfolk, Virginia one of the primary users of products sold by Palmer Products for use by the U.S. Navy?

MR. PIERCE: Let me object to the form, simply for the reason I believe the witness has testified he doesn't have any firsthand knowledge of the standard which the products may have been sold, if they were, into Norfolk. Based on that recollection of his testimony. I believe that would be an improper form. I object to the form only.

BY MR. BROOKS:

Q You can still answer the question, if you're able to?

A Norfolk Naval Shipyard was not the only place in the United States shipyard that used a lot of non-skid.

Q What other shipyards used the non-skid?

MR. PIERCE: Interpose the same objection that we had earlier with respect to other shipyards other than Norfolk, which, I assume, is the basis of your question.

MR. BROOKS: Certify that question, also.

BY MR. BROOKS:

Q Were there any other shipyards which used more non-skid made by Palmer Products made during the 1970's than the shipyard in Norfolk, Virginia?

A Only what I recall, and this is a long time ago, on the West Coast like Long Beach Naval Shipyard. That was, at that time, a large user.

Q So, would it be true that the U.S. Navy Shipyard in Long Beach, California, would have been the only other shipyard which would have used the non-skid during the 1970's in the same quantity that the non-skid was used by the U.S. Navy in Norfolk, Virginia?

A As far as I can recall.

Q Did you ever visit the U.S. Navy shipyard in Norfolk, Virginia?

A Yes, I did.

Q On how many occasions?

A I cannot tell you how many occasions.

Q Were they numerous occasions? Is it because there is too many to count?

A Let's put it this way. The less I visited, the better off it would be. That means that everybody was very happy.

Q So you would only go down there if there was a complaint concerning a product?

A Right.

Q Would you go down to the shipyard in Norfolk, Virginia like once a year, on an average, during the 70's or more or less?

A I can't really recall the frequency of it. It would be just a guess on my part.

Q When you were visiting the U.S. Navy shipyard in Norfolk, Virginia, did you ever see any of the products sold to the U.S. Navy which conformed to military specifications MIL-D-23003, Type II removed from the decks of any ships?

A As far as I can recall, yes, I had witnessed that.

Q When did you witness that?

A That — the date I cannot go back to because I do not remember, because it would be no routine visit.

Q Do you recall whether you witnessed the removal of that product while you were Vice-President of Palmer Products?

MR. PIERCE: What do you mean "that product"?

MR. BROOKS: The product which was sold to the U.S. Navy that conformed to MIL-D-23003, Type II.

MR. PIERCE: Obviously, there were many products that conformed to that MIL-D-23003 spec. With respect to the form of the question, I will object to it, unless it's specified what products you intend to make reference to.

MR. BROOKS: Well, I'm referencing any product which conforms to that military spec.

MR. PIERCE: You are asking Mr. Palmer if he can tell you whether he ever saw a product that conformed to that military spec being removed?

MR. BROOKS: While he was Vice-President of Palmer Products.

MR. PIERCE: In the 1970's?

MR. BROOKS: Well, from 1969 through 1971.

MR. PIERCE: I think some of your questions had the phrase "in the 70's" in them, that's why I was repeating it.

MR. BROOKS: I'm just trying to get some type of time frame.

THE WITNESS: I must have, but I cannot recall.

BY MR. BROOKS:

Q Why do you feel you must have seen that during the time you were Vice-President of the company from 1969 to 1971?

A Well, first of all, in a small company such as ours, titles do not mean that much.

Q What does that mean, "that much"?

A Titles do not mean that much, and they're bandered around more than they probably should be in a small corporation. But to answer your question, I would say that although I do not recall, I could not truthfully tell you that I saw a product being removed in that period of time, MIL-D-23003, because I do not recall that. I have seen products removed.

Q Okay. Do you recall how the products you saw removed, were removed?

A At that period of time, it was a tenant machine.

Q What is a tenant machine?

A If I remember, a tenant machine is sort of like a rudder with a circular action that was kind of — just kind of just abrade the material down to the deck.

Q It had grinders on the bottom of it?

A Grinders, circular grinders.

Q It would be operated by a man who was standing up?

A Yes.

Q What products has Palmer Products sold which conform to MIL-D-23003, Type II?

A It would be our PM501M-1 Expoxit.

Q I believe before that a product called PM501-M Expoxit was sold that conformed to military spec MIL-D-23003, Type II; is that correct?

A I believe that's the case.

Q Now, do you know what years the product PM501-M Expoxit was sold to the U.S. Navy?

A As far as I could figure out, between 1962 through 1965.

Q How were you able to make that determination?

A By our approvals, approvals of the PM501-M and the approvals of the 501M-1.

Q I want to show you what's previously been marked as Plaintiff's Exhibit Number 9. Does that confirm your understanding that, beginning in 1965, the product which conformed with MIL-D-23003, Type II became known as PM501-1 Expoxit?

A Yes, that's right.

APPENDIX G

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

JERRY COCHRAN,	:	
Plaintiff,	:	
	:	DEPOSITION OF
vs.	:	
	:	F. STUART SAYRE
E.I. du PONT DE NEMOURS and	:	
AMERICAN ABRASIVE	:	
METALS CO.,	:	
Defendants.	:	

TRANSCRIPT of deposition taken by and before LORRAINE VAN TASSEL, a Certified Shorthand Reporter and Notary Public of the State of New Jersey, at the MARRIOTT HOTEL, Newark, New Jersey on Friday, March 4, 1988, commencing at 10:00 A.M.

APPEARANCES:

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FORSTON & WHITE, ESQS.
BY: C. MICHAEL EVERT, JR., ESQ.
Attorneys for Defendant, American Abrasive Metals Co.

Sayre - direct

Q Who were your competitors in this time period?

A My recollection is Palmer Products and Devoe & Raynolds.

Q Where is Palmer Products located?

A West Chester, Pennsylvania.

Q And Devoe?

A I believe they're now in Louisville, Kentucky.

Q Are they both operating companies now?

A Yes. Devoe & Raynolds is now a subsidiary of Grow Chemical. At this time, I believe, Devoe & Raynolds was a subsidiary of Celanese Coatings.

Q How about Palmer Company. Were they a subsidiary of anyone?

A No, they're a small company.

MR. BROOKS: Mark this as an exhibit.

(Whereupon the reporter received and marked GSA Contract, 1/1/86 to 12/31/76 as Exhibit 5 for Identification.)

both the Stockton and Norfolk. It appears we were delivering the item to Stockton and not to Norfolk. And that was a thousand B36076. The estimated quantities to Stockton were 5,424 pails. The estimated quantities to Norfolk, which we were not awarded, were 9,744 pails. They, again, went to a competitor.

Q Do you know what competitor that would have been?

A No.

Q Who were your competitors for that product and which product is that, first of all?

A That's 1000 B dark gray 37606 color. That's non-skid and that's the standard most used non-skid item.

Q Who would have been your competitors during that time?

A Palmer and Devoe

Q And was there any other product?

A Yes. We were awarded haze gray in singles to Norfolk, 441 single gallons.

Q And what product was that?

A EPOXO 1000 B, color haze gray.

Q Is that also a non-skid?

specification.

Q And that specification is set forth in Exhibit 6?

A Right.

Q And did American Abrasives manufacture a product which met these specific specifications?

A Yes.

Q What was the name of that product?

A EPOXO 1000 B.

Q Who else made products that met those same specifications?

MR. EVERT: When?

A Looking at this document at this time?

Q This time, in 1966.

A Palmer Products, Ren Plastics are the two that are shown. There may be others.

Q Do you know how often non-skids had to be replaced once it was placed on a deck of the ship?

A It varied widely.

Q What variables caused it to vary?

A There were occasions when non-skid failed after a week and had to be replaced, and there were occasions when it went for a number of years before having to be replaced.

Q Would non-skid last on a deck longer than five years?

MR. EVERT: Is the question is it possible or —

Q Okay, is it possible, first of all?

A It's possible.

Q Is that unlikely, then?

A As a practical matter, it's probably replaced before it becomes five years old.

Q Okay. Are you familiar with how long non-skids would last on the hanger deck of an aircraft carrier, if it was properly applied?

MR. EVERT: Any non-skid or EPOXO 1000 B or any non-skid meeting the military specifications?

MR. BROOKS: Any non-skids meeting the specification MIL-D-23003?

A It's really speculative, particularly talking about other companies' supplies.

Q Do you know how long EPOXO 1000 B would last on the hangar deck of an aircraft carrier?

A My guess is more than a year and it would last till they took it up sometime after that. It could be three years.

manufacturers, Devoe and Palmer, earlier. What years do you believe that they were supplying materials which met this specification, MIL-D-23003?

A Well, I know Palmer was approved — an approved supplier before 1967. I'm uncertain about when Devoe became an approved supplier.

Q You had mentioned them as your competition.

A Main.

Q Your primary competition?

A Yes.

Q Do you know if companies selling this particular product were specific in the geographic areas in which they would place their bids?

A No, they were not.

MR. BROOKS: Would you mark this?

(Whereupon the reporter received and marked Naval Ships' Technical Manual, Chapter 634 as Exhibit 8 for Identification).

MR. BROOKS: Mark that, too.

Sayre - direct

came into effect in May of 1986, is that correct?

A That's my understanding of that.

MR. EVERT: I'm sorry, 1976?

MR. BROOKS: 1976.

Q Is that correct?

A Yes.

Q Okay. We have here what is marked as Exhibit No. 9 and which is six pages long with the title "Qualified Products List" of products qualified under Military Specification MIL-D-23003, received September 26th, 1969.

What is this document?

A It's a list of approved manufacturers of products qualified under MIL-D-23003.

Q We have here, under "Government Designation," something that's Type I and something that's Type II.

Do you know what the significance of those two types are?

A The Type I was a one-part phenolic-based resin and Type II was a two-part epoxy-based resin.

Q Do you know where the Type I was used or what its purpose was for?

A The Type I was the original non-skid under

MIL-D-23003 which was used probably until the early '60s, and basically, phased out because epoxy came in as a stronger resin.

Q So, Type II would have been the type used in the late '60s and early '70s?

A Yes.

Q This particular document seems to begin to list the suppliers in 1969 and then goes from the second page to 1966, and on the next page 1965, on the next page, to 1964, on the next page, to 1963, to the next page of 1962. Would that be correct?

A Yes.

Q In reference to the first page, which is dated April 15th, 1969, does this list here mean that only those suppliers listed here could sell the Type II non-skid to the Navy?

A Yes.

Q Okay. And those four are American Abrasive Metals Company, Devoe & Raynolds Company, Inc., a subsidiary of Celanese, next, Palmer Products, Incorporated, and next, Ren Plastics, Incorporated, is that correct?

A That's correct.

Sayre - direct

(Whereupon the reporter received and marked Product Manual as Exhibit 10 for Identification.)

BY MR. BROOKS: (Continuing)

Q This is Exhibit 10 entitled "Product Manual", apparently of Devoe Marine Paints and Coatings, date September, '67.

MR. EVERT: Gene, I think there are some loose pages stuck inside that bound document that all concern Devoe.

Q It's 15 pages long and is marked as Exhibit 10.

Mr. Sayre, does this concern any non-skit products made by Devoe?

A Yes.

Q Which non-skid products are they?

A They have a page called a Product Data Sheet for Formula 237 M, Devran System, D-E-V-R-A-N System Bulletin. Devran 237 M is shown as their approved product under MIL-D-23003, Type II on QPL-23003-11.

Sayre - direct

Q And that is Exhibit No. 9 you just referred to as the Qualified Products List, and you have found the product of Devran listed in this product catalog, is that correct?

A Yes.

Q Is this product similar to EPOXO 1000 B?

A Generally similar.

Q In other words, it meets the same —

A It meets the same specs.

Q Okay. We have here what are Devoe — appear to be Devoe publications regarding their products. We'll mark this as Exhibit 11.

(Whereupon the reporter received and marked Publications of Devoe & Raynolds, Co., Inc. (23 pages) as Exhibit 11 for Identification.)

BY MR. BROOKS: (Continuing)

Q Is Exhibit No. 11 all of the product script of sheets you have from Devoe in your files, other than the product catalog we previously referred to?

Sayre - direct

in which you did not sell EPOXO 1000 B to either the GSA or the Navy?

A I know there have been years, but I don't know. One year we did not get the contract at all, and maybe two years we didn't get it at all, but I don't know what years those were.

Q Which competitor of yours would usually get the contract, if you did not get the contract?

A Either Devoe or Palmer. Product Research Corporation, PRC, has been active. They got it in the not-too-distant past.

Q When did they begin being a competitor?

A I don't know. We didn't see their name on the QPL's, so —

MR. EVERT: Approximately is fine, if you know approximately.

A I would say late '70s.

(Whereupon, a luncheon recess was taken.)

(Whereupon, the deposition resumes after the recess.)

BY MR. BROOKS: (Continuing)

Sayre - direct

A Yes, but maybe I should explain a little bit what it does.

Q What does the Research and Development Department or group do at American Abrasives?

A It's primarily associated with the coatings effort there and a large part of its work is to qualify its products and keep them qualified and keep them working properly from the Navy specifications standpoint. It also does the quality assurance.

Q Okay. What does quality assurance involve?

A It involves checking samples from production to make sure that our product is okay from a quality standpoint in reference to these specifications.

Q How many persons are involved in the research and development part of your business?

A Today, there probably are four or five or six.

Q Do you know how many employees of American Abrasives were involved in research and development, on an average, during the years of 1968 to 1974?

Sayre - direct

A That's correct.

Q Do you know what the trade name of your competitor's products were which met Specification MIL-D-23003, Type II?

A They're listed on the QPL. QPL does indicate each manufacturer's trade name.

Q Okay. I have here what has been marked as Exhibit 9, which is a Qualified Products List for MIL-D-23003 and lists also those specs, Type II. On this list, what were the trade names of your three competitors, in the Type II category?

A Devoe & Raynolds was Devran 237 M, for Palmer Products was PM501M-1 EPOXIT.

MR. EVERT: That's E-P-O-X-I-T.

A (Continuing) and for Ren Plastics, it was RP-412.

Q Do you recall what these products looked like when they were packaged by their various manufacturers?

A Over the — you know, I can say what I recall as having seen once, but whether that was accurate and whether that was consistent over a period of time and whether that was at the time you're talking about, I can't say for sure.

(2)

No. 91-856

In The

Supreme Court of the United States

October Term, 1991

JERRY COCHRAN,

Petitioner,

vs.

AMERICAN ABRASIVE METALS CO., DEVOE & RAYNOLDS CO., HOECHST CELANESE CORPORATION, GROW GROUP, INC., and PALMER INTERNATIONAL, INC.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

CONSOLIDATED BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether a product liability action involving a sailor aboard a ship mandates the application of federal admiralty and general maritime jurisdiction.

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CONSTITUTION, STATUTES AND REGULATIONS

OPINIONS BELOW

Petitioner has provided the decision of the United States Court of Appeals for the Eleventh Circuit in *Cochran v. E.I. duPont de Nemours*, Nos. 90-8113 and 90-8535, slip op. (11th Cir., June 19, 1991), and has provided the Order of the Honorable Orinda D. Evans, Judge, United States District Court for the Northern District of Georgia entered on November 2, 1989 and January 4, 1990 as Appendix A and Appendix B respectively, to the Petition for Writ of Certiorari.

STATEMENT OF JURISDICTION

Respondents agree with petitioner's statement of jurisdiction.

CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS INVOLVED

The Respondents agree that Petitioner contends that U.S. Constitution Article 3, §2 and 28 USC § 1333(1) represent the constitutional provisions and statutes pertaining to the exercise of admiralty jurisdiction. Respondents deny that admiralty jurisdiction, under any provision, statute or regulation, is applicable in this case.

STATEMENT OF CASE

This is a personal injury product liability action in which Petitioner Jerry Cochran (hereinafter "Cochran",

"Petitioner", and/or "Jerry Cochran") alleges that between 1972 and 1974, he was exposed to and injured by products manufactured by Respondents herein. The original complaint was filed June 30, 1987 against Respondent American Abrasive Metals Company. R.1-1. On May 13, 1988, Petitioner filed his First Amended Complaint adding, *inter alia*, Hoechst Celanese Corporation, Grow Group, Inc. and Devoe and Raynolds Company and Palmer International, Inc., the remaining Respondents, as party Defendants therein. The jurisdiction of both the original Complaint and First Amended Complaint were based upon diversity of citizenship. R.1-1, R.1-25. On August 16, 1989 Respondents filed a Motion for Summary Judgment in the United States District Court for the Northern District of Georgia, based upon a number of legal and factual issues including the statute of limitations and lack of product identification. R.4-141, 144, 166. Petitioner filed his Second Amended Complaint in the United States District Court for the Northern District of Georgia on October 6, 1989, alleging admiralty jurisdiction. R.6-164, 166.

Summary Judgment was entered in favor of Respondents herein by the United States District Court For the Northern District of Georgia on November 2, 1989 on the grounds that the exercise of admiralty jurisdiction was not proper and that Jerry Cochran's claims were time-barred under the applicable state law. R.6-171. It is from this Order that Petitioner appealed to the United States Court of Appeals for the Eleventh Circuit. R.7-191.

On June 19, 1991 the United States Court of Appeals for the Eleventh Circuit rejected, *inter alia*, Petitioner's contentions that because he was exposed to dust while

working as a sailor aboard a naval vessel on navigable waters both at sea and at port, his products liability claim fell within the ambit of maritime jurisdiction. Presented with these issues the United States Court of Appeals for the Eleventh Circuit declined to extend admiralty jurisdiction to Cochran's claims. These are the precise factual and legal issues pending before this Court in the Petition for Writ of Certiorari.

STATEMENT OF FACTS

Petitioner, Jerry Cochran, was employed by the United States Navy from approximately October 1972 to 1974 during which time he alleges he contracted an occupationally-related disease. (R.1-1 and Deposition of Jerry Cochran, January 5, 1989, (hereinafter "Cochran I") at 218-219). Specifically, Jerry Cochran alleges exposure to Respondents' products while assigned to the USS Independence on a painting/grinding crew for approximately 9 months in 1972. (Deposition of Jerry Cochran, March 1, 1988 (hereinafter "Cochran II") at 134-135). During this time period, the USS Independence was home-ported in Norfolk, Virginia. (Cochran I at 218-219). A large percentage of this time was devoted to an overhaul of the vessel while the vessel was not at sea. (Deposition of Eugene Dickerson, March 4, 1982 at 26). Jerry Cochran's responsibilities on the grinding crew required him to patch worn areas of non-skid floor covering, grind it down, sweep it up and reapply the paint. (Cochran I at 35-37). Non-skid floor covering is a type of paint manufactured by Respondents and is used for a variety of purposes. (R.6-170, R.5-156-158). One purpose is to coat surfaces to

avoid slippage and one such use is on the decks of marine vessels. *Id. See also* (Deposition of Eugene Dickerson, March 4, 1982, at 37).

The United States Navy published a performance specification MIL-D-23003 which applied to the purchase of non-skid paint. (R.5-154). Respondents, among others, were approved suppliers of non-skid paint and were listed as such on the qualified product list published by the United States Navy. *Id.* Non-skid paint products were not sold solely for maritime use. (R.6-170, R.5-156-158).

In 1974, Jerry Cochran was diagnosed by physicians as having sarcoidosis. (R.6-170, Cochran I at 81). Sarcoidosis is an idiopathic disease – a disease of unknown origin. Sarcoidosis is a disease which can affect many systems of the human body and oftentimes affects the lung. It has been noted that the disease commonly occurs among young black males who reside in the southeastern United States. (Deposition of Dr. David Groth, May 3, 1989, pp.56, 60-62). Jerry Cochran is a black male from the southeastern United States and was within the at-risk range when he contracted sarcoidosis. *Id.*

In 1975, Jerry Cochran was formally discharged from the Navy and returned home to Albany, Georgia where he continued to seek medical treatment. (R.6-170). He received diagnoses of sarcoidosis from various sources from 1975 to 1979 and a diagnosis of schizophrenia in 1977. *Id.*

For over 10 years prior to filing this lawsuit, Mr. Cochran saw numerous physicians in an attempt to causally relate his illness to his employment in the United States Navy. (Cochran I at 127, 141, 144, 151-152, 156, 167, 169, and 174).

Tissue biopsies were taken from Cochran's lymph nodes in 1974 to determine the cause and extent of Cochran's illness. In 1984, a tissue analysis was performed by the Armed Services Institute of Pathology on the 1974 tissue, at Jerry Cochran's request, to determine the causal relationship, if any, between his condition and his exposure to nonskid paint. (R.4-146, Exhibit C). The presence of silica was noted in the tissue on February 15, 1984 and Cochran was so informed in March 1984. *Id. See also* R.6-170 and Cochran I at 169.

A September, 1986 discharge summary from the Veterans Administration Hospital indicated that Jerry Cochran was competent and able to work. (R.6-170). However, Jerry Cochran has not been gainfully employed since his discharge from the U.S. Navy. (Cochran II at 167, 168).

Jerry Cochran underwent an elective transbronchial biopsy of the lower left lung in May of 1987. A report from the staff pathologist at the Veterans Administration Hospital indicated that he saw no change from the biopsy performed in 1984. R.6-170. Jerry Cochran did not file his original complaint until June 30, 1987. R.1-1.

RESPONDENTS ARGUMENT AGAINST THE GRANTING OF A PETITION FOR WRIT OF CERTIORARI

Rule 10 of the Rules of the Supreme Court of the United States sets forth the basis upon which a Writ of Certiorari may be granted. The Rule reads in pertinent part:

> 1. A review on writ of certiorari is *not a matter of right*, but of judicial discretion, and will be granted only when there are special and important reasons therefor. The following, while neither controlling nor fully measuring the Court's discretion, indicate the character of reasons that will be considered.
>
> (a) When a federal court of appeals has rendered a decision in conflict with the decision of another federal court of appeals on the same matter; or has decided a federal question in a way in conflict with a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of this Court's power of supervision.

U.S. Sup. Ct. Rule 10.

Despite Petitioner's assertion to the contrary, there are no compelling reasons to justify the granting of a Writ of Certiorari with regard to the United States Court of Appeals for the Eleventh Circuit opinion in *Cochran v. E.I. duPont de Nemours*, Nos. 90-8113, 90-8535, slip op. (11th Cir., June 19, 1991, hereinafter "Cochran Appellate Decision"). The Cochran Appellate Decision is neither in conflict with the decisions of the United States Supreme Court nor the various circuit courts of appeal. Moreover,

as will be discussed below, the Cochran Appellate Decision is not in conflict with the decisions cited by Petitioner in support of his reasons for granting the writ of certiorari.

For example, Petitioner first argues that the Cochran Appellate Decision is in direct conflict with *McDermott International v. Wilander*, 498 U.S. ___, 112 L.Ed.2d 866, 111 S.Ct. 807 (1991) and *Sisson v. Ruby*, 497 U.S. ___, 111 L.Ed.2d 292, 110 S.Ct. 2892 (1990). A careful analysis however, of these cases indicates that the Cochran Appellate Decision, as well as the cases relied upon by the Eleventh Circuit in that decision, are not in conflict with the United States Supreme Court.

In *McDermott*, this court addressed the issue of the status of a seaman for purposes of the application of the Jones Act. The Cochran Appellate Decision does not involve the Jones Act and its holding is not contingent or reliant upon the fact that Cochran was or was not a seaman. In fact, the Eleventh Circuit held that Cochran was a naval officer who performed work upon a ship at sea. Admiralty jurisdiction was found to be lacking by the Eleventh Circuit for reasons having no bearing on whether Petitioner was or was not a seaman.

Petitioner next argues that the Cochran Appellate Decision is in direct conflict with the United States Supreme Court's opinion in *Sisson* based upon an improper reliance upon *Lewis Charters, Inc. v. Huckins Yacht Corp.*, 871 F.2d 1046 (11th Cir. 1989) by the Eleventh Circuit. Petitioner's assertions in this regard are without merit.

First, it is important to note that *Lewis Charters* was cited by this court in *Sisson*. Second, although at first glance, *Sisson* and *Lewis Charters* appear factually similar, the divergent outcomes are consistent with the analysis established by this Court. Both cases involved fires which originating on marine vessels which resulted in damage to other vessels. Petitioner urges error merely because the results differed. However, the analysis employed by both courts with regard to the application of admiralty jurisdiction is consistent with that utilized in Cochran Appellate Decision.

In *Lewis Charter,* the origin of the fire occurred on a boat which was in a paint facility in a marina shipyard. In *Sisson,* the fire occurred on a vessel in navigable waters at the marina. In *Sisson,* this court held that storage and maintenance of a vessel at a marina on navigable waters in that situation bore a substantial relationship to traditional maritime activity in that the spread of a fire to various vessels in navigable waters at the marina could effect maritime commerce. *Sisson,* 110 S.Ct. at 2898.

The Eleventh Circuit in *Lewis Charters* specifically found that navigation was not affected and could in no way be affected by the fire in that case because the fire would not impact other vessels engaging in commerce in those waters. *Id. Lewis Charters,* 871 F.2d at 1052. Admiralty jurisdiction was held not to apply to the facts in *Lewis Charters* because a resolution through the application of admiralty law would have no impact on maritime commerce. *Id.* at 1051-1052.

Moreover, the Eleventh Circuit determined that although Cochran satisfied the "locality test" for admiralty jurisdiction, he failed to satisfy the "nexus test" as defined by this court in *Executive Jet Aviation, Inc. v. City of Cleveland*, 409 U.S. 249, 93 S.Ct. 493 (1972). Specifically, the facts as adjudged by the United States District Court for the Northern District of Georgia and by the United States Court of Appeals for the Eleventh Circuit show that the use of non-skid paint, manufactured by Respondents herein, was not an instrumentality used specifically for maritime purposes and further that Cochran's alleged lung injury afflicts literally thousands of land-based workers as opposed to being an injury unique to or related to maritime commerce. Therefore, the Eleventh Circuit held that Petitioner could not "show a discernible relationship between his exposure and the traditional maritime activities involving navigation or commerce on navigable waters." This is the precise factual and legal analysis adopted by this court.

Last, Petitioner argues that the Cochran Appellate Decision is in conflict with the decision of the Ninth Circuit in *Martinez v. Pacific Industrial Service Corp.*, 904 F.2d 521 (9th Cir. 1990). In support of this proposition, Petitioner argues the mere fact that admiralty jurisdiction was applied to a situation involving a maintenance man cleaning boilers on a ship, the Eleventh Circuit decision is contrary to that of the Ninth Circuit. In *Martinez*, the plaintiff was injured while using equipment with an operations manual designed for use by the Navy. The injury in *Martinez* was caused by pressurized water and was of the type that is likely to occur at sea. While it is true that Petitioner, at least arguably, was involved in

maintenance of a vessel, neither the instrumentality used, his alleged injury nor the method of sustaining those injuries were present in *Martinez*. Factually and legally, the cases are distinguishable. There is nothing present in the case at bar which indicates that there is a significant relationship or connection to maritime navigation or commerce. Even the *Martinez* court held that where the injury and instrumentality bear no particular connection to maritime navigation or commerce, admiralty law may not apply to the particular case. *Id.* at 525.

The alleged injury in the instant case is not specifically related to any type of maritime equipment and is the type that commonly occurs on land. Accordingly, there is no conflict between the circuits regarding the applicability of admiralty jurisdiction. More importantly, any conflicts which might have existed have been resolved by this Court's decision in *Sisson v. Ruby*, 110 S.Ct. 2892 (1990).

Thus, in harmony with the United States Supreme Court and the Circuits, the Eleventh Circuit found that Cochran's injuries and the instrumentality involved in those injuries were not connected to traditional maritime concerns and thus the resolution of Cochran's claims would have no impact on traditional maritime commerce. This being the case, the Eleventh Circuit, consistent with this court's analyses held the application of admiralty law in this case is improper.

Rule 10 of the Rules of the Supreme Court of the United States does not mandate certiorari in all cases. Rule 10 merely states that "[a] petition for a Writ of Certiorari will be granted only when there are special and

important reasons therefore." Petitioner herein has demonstrated no special or important reasons for the granting of the Petition for a Writ of Certiorari. Contrary to petitioner's assertions, the Cochran Appellate Decision is not in conflict with the decisions of this court or other circuits. Rather, the Cochran Appellate Decision is based upon the established precedent of this court and further promotes the general uniformity of the law of admiralty.

Accordingly, the Petition for Writ of Certiorari should be denied.

DISCUSSION

FEDERAL ADMIRALTY JURISDICTION DOES NOT APPLY MERELY BECAUSE INJURIES ARE ALLEGED TO RESULT FROM EXPOSURE ON A SHIP IN NAVIGABLE WATERS.

A. Location Test, The Historical Framework.

Article III, Section 2 of the United States Constitution grants exclusive jurisdiction of admiralty in maritime cases to the federal courts. U.S. Const. art. III, §2. "Congress has elaborated on this jurisdictional grant by providing that the federal district courts shall have original jurisdiction, exclusive of the courts of the states, of: (1) any civil case of admiralty or maritime jurisdiction, saving to suitors [cits. omitted] in all cases under all other remedies to which they are otherwise entitled [cits. omitted]". *Admiralty – The Fourth Circuit falls in line – Oman v. Johns-Manville Corp.*, 22 Wake Forest L. Rev. 253 (1987).

Historically, the traditional test of federal admiralty jurisdiction was the "locality" test. If a tort occurred on navigable waters, an action was cognizable in federal court under admiralty jurisdiction. *Id.* at 257. However, the "locality only" test has been replaced and is no longer the basis upon which admiralty jurisdiction is applied in tort cases. *Executive Jet Aviation, Inc. v. City of Cleveland*, 490 U.S. 249, 34 L.Ed.2d 454, 93 S.Ct. 493 (1972).

B. A Maritime Nexus is Necessary to Establish Federal Admiralty Jurisdiction.

In 1850, admiralty scholar Judge Benedict expressed his "celebrated doubt" as to whether admiralty jurisdiction should depend exclusively upon the locality of a tort and as to whether there should be some nexus between the tort and a maritime concern. *Executive Jet Aviation v. City of Cleveland*, 409 U.S. 249, 257 (1972). Prior to *Executive Jet*, some lower federal courts had considered and required some nexus between a tort and maritime activity to establish federal admiralty jurisdiction over the action on the tort. *Executive Jet, supra*, at 257-258. *See also* Wake Forest Law Review, *supra*, at 257-259. In *Executive Jet*, the United States Supreme Court held the nexus test to be the applicable standard and restricted the scope of the exercise of federal admiralty jurisdiction. This Court stated, "it is far more consistent with the history and purpose of admiralty to require also that the wrong bear a *significant* relationship to *traditional* maritime activity." *Executive Jet, supra*, at 268 (emphasis added). The rationale for this holding is twofold: (1) the exercise of admiralty jurisdiction tends to preempt matters traditionally regulated by

the states, and (2) admiralty law is intended to deal with navigational rules such as the manner in which vessels travel, seaworthiness and cargo damage. *Id.* 269-73.

This Court's decision in *Executive Jet* was limited to its facts which involved an airplane accident. To the extent there was any confusion as to whether the nexus test enunciated in *Executive Jet* applied more broadly to all tort actions, that question was answered in *Foremost Ins. Co. v. Richardson*, 457 U.S. 668, 73 L.Ed.2d 300, 102 S.Ct. 2654 (1982). In *Foremost*, the Court held that satisfaction of the nexus test was a prerequisite to any exercise of federal admiralty jurisdiction in a tort case. *Id.*

In *Sisson*, this Court gave further direction to the determination of the existence of federal admiralty jurisdiction. In *Sisson* the Court commented on its holding in *Foremost* as follows:

> "In *Foremost* the court unanimously agreed that the purpose underlying the existence of federal maritime jurisdiction is the federal interest in the protection of maritime commerce, and that a case must implicate that interest to give rise to such jurisdiction."

Sisson, 110 S.Ct. at 2896, fn. 2. In *Sisson* the Court clarified that the nexus test adopted in *Executive Jet* and applied in *Foremost*, involved at least a two part analysis. First, the incident must be likely to disrupt commercial activity and, second, there must be "a substantial relationship between the activity giving rise to the incident and traditional maritime activity." *Id.* at 2897.

Shortly after this Court's announcement of a nexus requirement for the exercise of federal admiralty jurisdiction in *Executive Jet*, the United States Court of Appeals for the Fifth Circuit considered the admiralty jurisdiction question in *Kelly v. Smith*, 485 F.2d 520 (5th Cir. 1973), *cert. denied*, 416 U.S. 969 (1974). In *Kelly*, the Fifth Circuit derived four (4) factors significant in the nexus analysis: (1) the functions and roles of the parties, (2) the types of vehicles and instrumentalities involved, (3) the causation and type of injury, and most importantly (4) the traditional concepts of the role of admiralty law. *Kelly* at 525.

In *Sisson* this Court declined to specifically adopt the *Kelly* four factor test because it was not necessary, at that juncture, for analyzing the admiralty jurisdiction question presented. This Court indicated that the test developed in *Executive Jet* and refined in *Foremost* was sufficient in *Sisson*, and at least in cases in which both parties are engaged in similar activities. In the case now before the Court the parties were not involved in the same types of activity. Petitioner, Jerry Cochran, was engaged in the activity of removing paint from the decks of the U.S.S. Independence. Respondents are alleged to have manufactured, sold and supplied the paint. Therefore, regardless of whether the *Foremost* or the *Kelly* test were to be used, the result would be the same. There is no basis upon which to support the admiralty jurisdiction of the federal courts under any accepted theory.

Moreover, every court which has considered the issue of whether to extend federal admiralty jurisdiction to cases involving claims by workers alleging exposure to harmful particles, regardless of the test employed, has declined to so expand that jurisdiction. *See Owens Ill., Inc.*

v. United States District Court, 698 F.2d 967 (9th Cir. 1983); *Keene Corp. v. United States*, 700 F.2d 836 (2d Cir. 1983); *Austin v. Unarco Indus., Inc.*, 705 F.2d 1 (1st Cir. 1983), *cert. denied*, 463 U.S. 1247, 104 S.Ct. 345 (1984); *Lowe v. Ingalls Shipbuilding, a Division of Litton*, 723 F.2d 1173 (5th Cir. 1984); *Myhran v. Johns-Manville Corp.*, 741 F.2d 1119 (9th Cir. 1984); *Harville v. Johns-Manville Corp.*, 731 F.2d 775 (11th Cir. 1984); *Oman v. Johns-Manville Corp.*, 764 F.2d 224 (4th Cir. 1985), *cert. denied*, 474 U.S. 970 (1985); *Woessner v. Johns-Manville Corp.*, 757 F.2d 648 (5th Cir. 1985); *Lingo v. Great Lakes Dredge & Dock*, 638 F. Supp. 30 (E.D.N.Y. 1986); *Touchstone v. Land & Marine Applicators, Inc.*, 628 F. Supp. 1202 (E.D. La. 1986); and *Saunders v. H.K. Porter Co., Inc.*, 643 F. Supp. 198 (E.D. Va. 1986). The only exception to this was the Fourth Circuit's holding in *White v. Johns-Manville Corp.*, 662 F.2d 234 (4th Cir. 1981), *cert. denied*, 454 U.S. 1163 (1982) ("*White II*"). *White II* was explicitly overruled in *Oman, supra.*

Harville is significant not only as Eleventh Circuit precedent, but also as one of the first cases to consider and reject the reasoning of *White II, supra.* The *Harville* plaintiffs alleged exposure to airborne particles (asbestos) while aboard ships in navigable waters. In *Harville,* this Court held that the plaintiffs' claims did not bear a significant relationship to traditional maritime activity. *Harville, supra,* at 783. The Eleventh Circuit applied the four (4) factors set forth in *Kelly, supra.* In analyzing the four (4) factors of the nexus test, the *Harville* court cautioned that: "exclusive focus on any single aspect of the plaintiff's claims produces a mechanistic analysis not entirely consistent with the thrust of *Executive Jet.*" *Harville, supra,* at 784. The *Harville* court concluded that the fourth factor

in the *Kelly* nexus test, the traditional concepts of the role of admiralty law, was the most significant factor and deserved "special emphasis". *Id.*

Jerry Cochran claims to have been exposed to harmful particles while grinding nonskid paint off the surface of the U.S.S. Independence. His claims are no different from the claims of the plaintiffs in the above-cited cases. Accordingly, there is simply no support for extension of federal admiralty jurisdiction to the types of claims set forth by Petitioner.

C. Cochran's Claims Do Not Satisfy the *Kelly* Test for the Exercise of Admiralty Jurisdiction.

1. The Functions and Roles of the Parties.

The Respondents in the instant matter manufactured nonskid paint which allegedly harmed Jerry Cochran during its removal. There is nothing uniquely maritime about the supply of nonskid paint products. Nonskid paint products are supplied for a myriad of land-based uses. This fact militates against extension of admiralty jurisdiction in the instant matter. *Id.* at 784.

Admittedly, Jerry Cochran was a sailor during his alleged exposure to defendant's products. However, it is clear that the mere fact that Petitioner was a sailor does not automatically mandate that his claims be consideration by a federal court sitting in admiralty. *Petersen v. Chesapeake & Ohio R.R. Co.*, 784 F.2d 732 (6th Cir. 1986), *Lingo, supra.* Moreover, no specialized maritime skill was required by Jerry Cochran to perform his duties on the grinding crew aboard the U.S.S. Independence. Jerry

Cochran's use of a tennant machine, a broom, and a shovel during his activities on the grinding crew are identical to the methods that he would have used had he been grinding nonskid paint off a pier adjacent to the U.S.S. Independence. Jerry Cochran was not injured in any function as a gunnery crewman or a steam catapult operator or the like. Rather, Jerry Cochran was allegedly injured in his role as a painter, a role that only coincidentally occurred aboard a ship. Thus, Petitioner cannot reasonably contend that his purpose was within the core purpose of maritime law; "protection of vessels on navigable waters," and therefore of a maritime nature within the meaning of the first prong of the "*Kelly*" analysis. *Harville, supra,* at 784-785.

2. The Types of Vehicles and Instrumentalities Involved.

A consideration of the vehicles and instrumentalities factor in the nexus analysis suggests the United States District Court for the Northern District of Georgia properly declined to exercise federal admiralty jurisdiction in the instant matter. While the alleged injuries here took place aboard a ship as in *Harville* the District Court found that: "the fact that the products were applied aboard ship is at most tangential and has no [more] effect on the character of the plaintiffs' claims than the use of insulation materials simply designed for covering pipes aboard ship." R.6-170. As in *Harville,* "[n]othing about the underlying claims would be different if the [appellant Jerry Cochran] had been employed constructing or repairing buildings on land". *Harville, supra,* at 785. As noted

above, Jerry Cochran used a tennant machine, a broom and a shovel to perform his grinding crew duties, and alleges exposure to nonskid paint. Petitioner does not even contend that the instrumentalities are of a uniquely maritime character.

The vehicles and instrumentalities of Cochran's alleged exposure have no particular marine quality and therefore his claims fail to satisfy the second prong of the *Kelly* test.

3. The Causation and Type of Injury.

"The nonmaritime nature of injuries, injuries that now afflict thousands of land-based workers as well, militates strongly against application of maritime jurisdiction." *Harville, supra,* at 785. Like the *Harville* plaintiffs, Petitioner claims exposure to airborne particles allegedly causing pulmonary disease. The alleged maladies: silicosis, asbestosis, mixed dust pneumoconiosis and/or berylliosis, from which Jerry Cochran allegedly suffers, have no peculiar maritime qualities. The alleged injuries would be identical had his exposure occurred on land.

4. The Traditional Concepts of the Role of Admiralty Law.

As explained in *Harville* the fourth *Kelly* factor, traditional concepts of the role of admiralty law, deserves "special emphasis". *Harville, supra,* at 784. Federalism concerns are implicated in the issue of whether a federal court should exercise its admiralty jurisdiction. "The Constitution's framers and Congress endowed federal

courts with jurisdiction over maritime disputes in order to advance specific federal interest . . . " *Harville, supra,* at 785. "The overriding concern of the maritime law is the federal interest in the need for a uniform development of law governing the maritime industries. *Foremost Ins. Co. v. Richardson,* 457 U.S. 668, 677, 73 L.Ed.2d 300, 102 S.Ct. 2654 (1982)." *Woessner, supra,* at 648.

As the court opined:

> It may be . . . [that particle exposure cases] should be governed by uniform substantive and procedural laws, and that such actions should be heard in the federal courts so as to avoid divergent results and duplicitous litigation in multiparty cases. But for this Court to uphold federal admiralty jurisdiction in a few only fortuitous [shipboard particle exposure cases] would be a most quixotic way of approaching that goal.

Executive Jet, supra at 273-274.

When considering the traditional concepts of the role of admiralty law factor, the purposes of exercising federal admiralty jurisdiction must not be forgotten.

> The law of admiralty has evolved over many centuries, designed and molded to handle problems of vessels relegated to the waterways of the world, beyond whose shores they cannot go. That law deals with navigational rules – rules that govern the manner and direction those vessels may rightly move upon the waters. When a collision occurs or a ship founders at sea, the law of admiralty looks to those rules to determine fault, liability, and all other questions that may arise from such a catastrophe. Through

> long experience, the law of the seas knows how to determine whether a particular ship is seaworthy, and it knows the nature of maintenance and cure. It is concerned with maritime liens, the general average, captures and prizes, limitation of liability, cargo damage, and claims for salvage.

Executive Jet, supra, at 269-270. Jerry Cochran's claims are not encompassed within the traditional concepts of the role of admiralty law as outlined in *Executive Jet.*

Furthermore, the claims of Jerry Cochran are no different from the claims of the *Harville* plaintiffs, or for that matter, from the claims of the plaintiffs in any of the previously cited cases. State law is not only adequate for handling these claims, but also federalism concerns counsel against usurpation by the federal courts of provinces normally set aside for state law. *Harville, supra,* at 786. More importantly, Cochran's claims do not implicate any of the issues normally reserved for federal courts sitting in admiralty, as set forth in *Executive Jet* above.

D. Cochran's Claims Do Not Satisfy The *Foremost* Test For The Exercise Of Admiralty Jurisdiction.

1. Disruption of Commercial Activity.

Clearly the alleged injury of a sailor generated by the grinding of paint off the deck of a ship has no implication in terms of maritime commerce. There is no showing by Petitioner that significant maritime commerce concerns are present in this case.

2. Substantial Relationship With Traditional Maritime Activity.

As discussed above, the activity in which Jerry Cochran was engaged, grinding paint off the deck of a ship, has little to do with traditional maritime activity. Jerry Cochran was allegedly injured while grinding paint off the decks of the U.S.S. Independence. His role and function was not uniquely maritime in nature. He used tools and supplies commonly used on land as well as at sea. His alleged injuries are not maritime in nature and are well known among land-based workers, a fact of which the entire federal court system is aware. These factors suggest that the activity of Jerry Cochran did not bear a significant relationship to traditional maritime activity.

CONCLUSION

The Petition for Writ of Certiorari should be denied in this matter; first, because justiciable concerns as required by Rule 10 of the Rules of the United States Supreme Court are not present. There is no conflict between the circuits. The Eleventh Circuit's analysis is entirely consistent with the established precedent of this Court.

Second, an analysis of the specific facts of Petitioner's claims clearly suggests that admiralty jurisdiction is not applicable. A contrary holding would obviate years of careful consideration of the issue and established precedent. The very reasons that admiralty jurisdiction

should not be invoked here are the reasons enunciated, time and time again, by this Court and the circuit courts which have been presented with this question.

Accordingly, the Petition of Writ of Certiorari should be denied.

Respectfully submitted,

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